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No. 10—

IN THE

Supreme Court of the United States

LA UNIÓN DEL PUEBLO ENTERO, *ET AL.*

Petitioners,

v.

FEDERAL EMERGENCY MANAGEMENT AGENCY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress made money available to repair homes "damaged by a major disaster to a safe and sanitary living or functioning condition." 42 U.S.C. § 5174(c)(2)(A). Congress directed the Federal Emergency Management Agency to issue "regulations to carry out this [program], including criteria, standards, and procedures for determining eligibility for assistance." *Id.* at § 5174(j).

FEMA responded with regulations that repeat the statutory text above, and do not say how FEMA determines eligibility for assistance. 44 C.F.R. §§ 206.110-120. FEMA establishes basic eligibility criteria outside regulations.

1. Are FEMA's regulations in 44 C.F.R. §§ 206.110-120 facially sufficient to satisfy the demand for regulations that appears in 42 U.S.C. § 5174(j)?

2. What standards govern judicial review of agency compliance with statutes that demand regulations? The decision below conflicts with two decades of D.C. Circuit jurisprudence on this question.

PARTIES TO THE PROCEEDING

The petitioners are the membership organization *La Unión del Pueblo Entero* (LUPE) and fourteen individuals: Francisca Adame, Alejandro Alvarado, Elizabeth Alvarado, Manuel Benavidez, Maria Gallardo, Jose Gonzales, Augustina Iglesias, Noe Jimenez, Veronica Jimenez, Ernesto Lopez, Norma Lopez, Francisca Perez, Rosa Elia Villarreal, and Cruz Alejandro Zamora. Petitioner LUPE is a non-profit corporation recognized under section 501(c)(3) of the Internal Revenue Code. No parent or publicly held company controls LUPE or owns 10% or more of its stock (it has no stock). The petitioners were plaintiffs and plaintiffs-appellees in the courts below.

The respondent is the Federal Emergency Management Agency (FEMA), part of the United States Department of Homeland Security, the defendant and defendant-appellant in the courts below.

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v.

FEDERAL EMERGENCY MANAGEMENT AGENCY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

INTRODUCTION

In *Chevron v. Natural Defenses Resource Council*, 467 U.S. 837 (1984), this Court stated its seminal two-part test for judicial review of agency compliance with statutes. *Id.* at 842-43. This Court has applied *Chevron* over 100 times in the last quarter-century, but it has not yet applied *Chevron* to decide whether an agency has complied with a statutory demand for regulations.

Congress often requires agencies to issue regulations. *See Public Citizen v. Nuclear Reg. Comm'n*, 901 F.2d 147, 155 (D.C. Cir. 1990) (citing examples). In almost a dozen cases over two decades, the D.C. Circuit has decided whether agency attempts at regulation comply with statutory requirements. To determine whether the agency has

respected Congress's intent under *Chevron* step one, the D.C. Circuit compares each regulatory effort to the text, structure, history, and purpose of each statutory demand for regulations. To determine whether the agency's construction is "reasonable" under *Chevron* step two, the D.C. Circuit requires agencies to provide a reasoned explanation for choosing regulations that are vague.

Here, the Fifth Circuit held that *Chevron* step one is satisfied when required regulations "add significant content" to a statute as a whole. Then the Fifth Circuit refused to apply the D.C. Circuit's "reasoned explanation" test for *Chevron* step two. The differences in the circuits' *Chevron* tests are outcome determinative, as shown by this case's undisputed facts.

Congress made financial assistance available to repair homes "damaged by a major disaster to a safe and sanitary living or functioning condition." 42 U.S.C. § 5174(e)(2)(A). Then Congress required regulations "to carry out this [program], including criteria, standards, and procedures for determining eligibility for assistance." 42 U.S.C. § 5174(j). FEMA responded with the regulations published at 44 C.F.R. §§ 206.110-120.

Although these regulations add some eligibility criteria to those appearing in the statute, the regulations do not disclose the most basic criteria: how FEMA determines what damage is "disaster-related" and whether a home is "unsafe." FEMA develops basic eligibility criteria *outside* its regulations, and does not publish the eligibility standards that it uses. For example, FEMA denies repair assistance if it concludes that a home's condition *prior* to a disaster is a contributing cause of damage that is also caused by

a disaster. FEMA calls this "deferred maintenance."

"Deferred maintenance" has vast policy consequences. To supporters, it may conserve taxpayer money and reduce substandard housing. To detractors, it may focus assistance on higher-income families to the exclusion of lower-income families affected by the same disaster, and prevent entire neighborhoods from recovering.

FEMA alone has authority to chose which eligibility policies will apply. But the Fifth Circuit's reading of § 5174(j) allows FEMA to make significant policy choices such as "deferred maintenance" essentially by secret proclamation, without accounting for the relevant data, considering alternatives, stating reasons, or receiving input from the regulated public. The Administrative Procedure Act (APA) establishes a scheme of "reasoned decisionmaking" for all agency action. *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 52 (1998). The decision below effectively allows FEMA to distribute financial assistance after disasters without engaging in reasoned decisionmaking or explaining why it declines to do so.

FEMA reports that over a dozen major disasters have been declared in each of the last ten years. The criteria that FEMA uses to distribute tens of millions of dollars in assistance affect tens of thousands of families across the nation every year. A consistent means of distributing these resources is no less necessary for disaster survivors than it is for people who seek logging permits or food stamps. This is, after all, what Congress demanded precisely in the disaster context. 42 U.S.C. § 5174(j); *see also* 44 C.F.R. § 1.4(f)-(h) (FEMA can adjust its regulations on

an emergency basis as necessary.). The alternative to regulatory development of eligibility criteria is what exists today: indeterminate eligibility standards that make FEMA appear to distribute financial assistance on an *ad hoc* basis. This Court holds that when agency standards are not ascertainable, agency decisions that are inherently "arbitrary." *Morton v. Ruiz*, 415 U.S. 199, 230-32 (1974). The decision below blesses arbitrary conduct writ large, and imposes it upon people least able to seek redress.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 608 F.3d 217. *See* App. 1a-18a. The opinion of the United States District Court for the Southern District of Texas is reported at 2009 WL 1346030 (May 13, 2009). *See* App. 19a-44a.

JURISDICTION

The Fifth Circuit entered its judgment on June 2, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS AT ISSUE

The Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974, as amended in 2000, states:

> The President may provide financial assistance for ... the repair of owner-occupied private residences, utilities, and residential infrastructure (such as a private access route) damaged by a major disaster to a safe and sanitary living or functioning condition ....

42 U.S.C. § 5174(c)(2)(A) (Pub. L. 106-390, § 206(a)(1) (Oct. 30, 2000). This section concludes:

> The President *shall* prescribe rules and regulations to carry out this section, including criteria, standards, and procedures for determining eligibility for assistance.

Id. at § 5174(j) (emphasis added). Pursuant to § 5174(j), FEMA regulations state:

> FEMA may provide financial assistance for the repairs of uninsured disaster-related damages to an owner's primary residence. The funds are to help return owner-occupied primary residences to a safe and sanitary living or functioning condition. Repairs may include utilities and residential infrastructure (such as private access routes, privately owned bridge[s], wells and/or septic systems) damaged by a major disaster.

44 C.F.R. § 206.117(b)(2)(i) (2009). The full text of FEMA's individual-assistance regulations appear in the Appendix. App. 57a-97a (44 C.F.R. §§ 206.110-120).

STATEMENT OF THE CASE

1. *Statutory and Regulatory Background*—The Stafford Act addresses many aspects of federal disaster response, only one of which is direct cash assistance to families. 42 U.S.C. §§ 5121, *et seq.* (Pub. L. 93-288, § 101 (May 22, 1974)). Between 1988 and 2000, all Stafford Act programs were administered as follows:

> The President may prescribe such rules and

> regulations as may be necessary and proper to carry out the provisions of this Act, and may exercise, either directly or through such Federal agency as the President may designate, any power or authority conferred to the President by this Act.

42 U.S.C. § 5164 (Pub. L. 100-707, § 105(m)(1) (Nov. 23, 1988)). President George H.W. Bush delegated most Stafford Act responsibilities to FEMA. Exec. Order No. 12,673, 54 Fed. Reg. 12,571 (Mar. 23, 1989).

In 2000, Congress rewrote the Stafford Act provisions governing financial assistance to individuals and families. 42 U.S.C. § 5174 (Pub. L. 106-390 § 206(a) (Oct. 30, 2000)). This amendment makes home repair assistance available as follows:

> The President may provide financial assistance for ... the repair of owner-occupied private residences, utilities, and residential infrastructure (such as a private access route) damaged by a major disaster to a safe and sanitary living or functioning condition[.]

Id. at § 5174(c)(2)(A)(i). After insurance is exhausted, the amendment requires that home repair assistance be available regardless of homeowner income. *Id.* at § 5174(c)(2)(B). Assistance is capped at $25,000 per household, adjusted for inflation. *Id.* at § 5174(h). The Act says nothing further about what eligibility standards govern the home repair program. Congress required additional eligibility standards to carry out the program, and also required that those standards be established by regulation:

> The President *shall* prescribe rules and regulations to carry out this section, including criteria, standards, and procedures for determining eligibility for assistance.

Id. at § 5174(j) (emphasis added). Congress required these regulations to be published by October 15, 2002. 67 Fed. Reg. 61446, 61449 (Sept. 30, 2002) (citing Pub. L. 106-390, § 206(d) (Oct. 30, 2000)).

Two weeks before the October 15, 2002 deadline, FEMA published the regulations at issue here. *Id.*; App. 57a-97a (44 C.F.R. §§ 206.110-120). By all accounts, the regulations are of limited use. App. 16a n.3 (The Fifth Circuit observes that "[e]ven FEMA seems to implicitly recognize that [the regulations] are rather poor ..."); *Ridgely v. FEMA*, 512 F.3d 727, 741 (5th Cir. 2008) ("FEMA could measurably improve the navigability of its processes by providing applicants with more understandable explanations of its ineligibility determinations.").

Despite the command of § 5174(j), the regulations do not say how FEMA determines eligibility for assistance. The regulations only report what FEMA "may" do. FEMA employs the "may" qualifier 74 times. *See, e.g.*, 44 C.F.R. § 206.117(c)(1) ("Repairs to the primary residence are limited to restoration of the dwelling to a safe and sanitary living or functioning condition and may include [a list of possibilities].").

The statutory text sets forth three eligibility criteria: (1) the home must be owner-occupied; (2) damage to the home must be disaster-related; and (3) repairs must be needed to render the home safe, sanitary, or functional. 42 U.S.C. § 5174(c)(2)(A). All three criteria must be met

before anyone is eligible for assistance.

FEMA regulations adequately address the first eligibility element. *See* 44 C.F.R. § 206.111 (defining "owner-occupied"). But the regulations say nothing more than the statute about elements two and three.

With respect to element two, FEMA admits that it "does not publish its standards for what is or is not disaster related." FEMA Answer at 4 ¶ 23. The Fifth Circuit observes that "FEMA's regulations for housing repair assistance are especially vague about the meaning of 'disaster-related.' Indeed, they do not venture beyond the statutory language." App. 16a; *compare* 42 U.S.C. § 5174(c)(2)(A) *with* 44 C.F.R. § 206.117(c)(1).

The regulations addressing element three only paraphrase the text of § 5174(c)(2)(A):

> *Functional* means an item or home capable of being used for its intended purpose.
>
> *Safe* means secure from disaster-related hazards or threats to occupants.
>
> *Sanitary* means free of disaster-related health hazards.

44 C.F.R. § 206.111. The regulations say nothing more than the statute about what disaster-related hazards merit repair to render a home safe, sanitary, and functional.

2. *Facts of This Case*—Hurricane Dolly struck Texas's Rio Grande Valley on July 23, 2008. Petitioners (Homeowners) are individuals and the membership organization *La Unión del Pueblo Entero*. Homeowners and their families were present inside their homes when

Dolly struck, and they saw Dolly cause extensive damage to their homes. *See, e.g.*, App. 103a-107a (photographs).

President George W. Bush declared Dolly a major disaster on July 24, 2008. On July 31, FEMA made repair assistance available under § 5174. Over 38,000 families sought housing assistance during FEMA's 60-day application window. FEMA paid $25 million in claims. App. 2a.

The Homeowners applied for repair assistance after Dolly, and FEMA found them "ineligible." *See, e.g.*, App. 101a-102a. FEMA's only written explanation was a form stating that each ineligibility determination was due to "insufficient damage" because "we have determined that the disaster has not caused your home to be unsafe to live in." *Id.* The Homeowners sought clarification, and FEMA staff orally informed many Homeowners that their applications were denied due to a condition that FEMA calls "deferred maintenance."

Indeed, FEMA issued about 15,000 deferred maintenance denials following Hurricane Dolly. App. 99a. FEMA spokesperson Charles Powell explained that Dolly's high rate of "deferred maintenance" denials resulted from the fact that "a lot of the homes built were built from second-hand materials .... So the damage was, in most cases, caused from the faulty building of the house and not the storm." *Id.* at 24a and 99a. Deferred maintenance is not referenced in any regulation or publicly available eligibility standard. Still, FEMA admits that it "collects, maintains, and uses information regarding deferred maintenance ...." FEMA Answer at 4 ¶ 23.

3. *Proceedings Below*—The Homeowners claim, *inter alia*, that FEMA's regulations are insufficient on their

face to satisfy the requirement for regulations that appears in § 5174(j). The Homeowners sought judicial review of the facial sufficiency of FEMA's regulations under the Administrative Procedure Act (APA). *See* 5 U.S.C. § 706(2).

The district court applied *Chevron* to decide whether FEMA has complied with § 5174(j). App. 35a. The district court recognized that FEMA's regulations explain some of the eligibility factors and define some of the relevant terms. App. 32a-33a. But as for disaster causation and safety, the only two elements that FEMA cited to deny the applications at issue, the district court held:

> [T]he regulations concerning eligibility FEMA has issued duplicate and fail to supplement the federal statutes. *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) ....
>
> ... Congress, in requiring that the President issue regulations outlining eligibility, indicates that the federal statutory text insufficiently outlines eligibility and therefore it is necessary that FEMA issue regulations providing [more] detailed criteria and standards.

App. 37a-38a. Consequently, the district court entered a preliminary injunction requiring FEMA to submit a plan describing how it proposes to: (a) issue additional regulations to comply with § 5174(j); and (b) use these additional regulations to reconsider the Homeowners' applications for assistance. App. 20a-21a.

The Fifth Circuit agreed with the district court that "the regulations do not ... set out a specific procedure by which FEMA investigators will decide the question

at the heart of Plaintiffs' complaint, namely, which damages are sufficiently 'related' to the declared major disaster to make an individual or household eligible for relief." App. 11a.

Despite this absence of standards necessary to decide eligibility for assistance, the Fifth Circuit held that FEMA's regulations survive *Chevron* step-one review because the regulations as a whole "add significant content" to the statute. App. 10a-13a. The court also held that *Chevron* step two does not require FEMA to explain its rationale for issuing regulations that are "especially vague." App. 14a-16a.

After concluding that FEMA's regulations are facially sufficient to satisfy § 5174(j) under *Chevron* step one, the court of appeals vacated the preliminary injunction and remanded the case for further proceedings. App. 18a. None of the remaining claims afford the same relief available under § 5174(j), and further litigation in the lower courts will not alter the facts or law as to the questions presented here.[1]

---

[1] Although this Court proceeds with caution in reviewing preliminary-injunction rulings, review is appropriate when further litigation will not change the facts or law presented to this Court, or where this Court deems the interests at stake to be important. *See, e.g., Winter v. NRDC*, 129 S. Ct. 365, 374 (2008). Here, further litigation will not change the text of the statute or regulations, which are the only items necessary to decide the facial challenge at issue. Moreover, resolution of the questions presented is critical to administration of disaster assistance as well as the many other statutes that demand regulations.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision merits review for two reasons. First, it squarely conflicts with decisions of the D.C. Circuit. The conflict is over a recurring issue of enormous importance: how courts are to review whether agencies comply with statutes that require regulations. Congress recently demanded regulations in major financial services, health care, and campaign finance statutes. All such statutes are undermined by the Fifth Circuit's new "add significant content" test.

Second, the decision below merits review for its national importance alone. Over a dozen major disasters are declared every year, affecting tens of thousands of families across the nation. From FEMA's regulations, these families can only perceive that their government decides what financial assistance to provide on an *ad hoc* basis, without consistent application house by house, block by block, or disaster by disaster. The Fifth Circuit approved of this conduct. This Court should decide for the nation whether FEMA's regulations comply with § 5174(j).

I. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM THE D.C. CIRCUIT

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." *Chevron*, 467 U.S. at 842. If Congress has decided the matter at issue, courts give effect to Congress's intent. If Congress has not decided the matter at issue, courts defer to any reasonable agency construction of the statute. *Id.* at 842-45.

While this Court has not yet applied *Chevron* to decide whether an agency has complied with a statutory demand for regulations,[2] the D.C. Circuit has done so nearly a dozen times over the past two decades. *See Shays v. FEC*, 528 F.3d 914, 931-32 (D.C. Cir. 2008) (campaign finance); *Cement Kiln Recycling Coalition v. EPA*, 493 F.3d 207, 217-24 (D.C. Cir. 2007) (hazardous waste incineration); *Ethyl Corp. v. EPA*, 306 F.3d 1144, 1148-50 (D.C. Cir. 2002) (vehicle emissions); *American Trucking Assn's v. U.S. Dept. of Transp.*, 166 F.3d 374, 377-80 (D.C. Cir. 1999) (truck safety); *State of New Mexico v. EPA*, 114 F.3d 290, 293-95 (D.C. Cir. 1997) (radioactive material disposal); *MST Express v. U.S. Dept. of Transp.*, 108 F.3d 401, 405-06 (D.C. Cir. 1997) (truck safety); *Consumer Federation of Am. v. HHS*, 83 F.3d 1497, 1504-05 (D.C. Cir. 1996) (medical laboratory testing standards); *NRDC v. EPA*, 907 F.2d 1146, 1163-65 (D.C. Cir. 1990) (deep-well waste injection); *Public Citizen*, 901 F.2d at 153-54 (nuclear power plant safety).

In the decision below, the Fifth Circuit agreed that "*Chevron* provides the framework for [its] analysis." App. 7a. But then the Fifth Circuit produced an analysis and

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[2] In *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87 (1995), this Court came closest to interpreting a regulation requirement. It held that "[t]o the extent that the Medicare statute's broad delegation of authority imposes a rulemaking obligation" upon the HHS Secretary, she discharged that duty by issuing "some 640 pages" of regulations that are "comprehensive and intricate in detail." *Id.* at 96. This Court found no "basis for suggesting that the Secretary has a statutory duty to promulgate regulations that, either by default rule or by specification, address every conceivable question in the process of determining" how to reimburse hospitals. *Id.*

decision that conflict with those of the D.C. Circuit. The D.C. Circuit has twice considered facts that are materially identical to those here and reached the opposite result. In almost a dozen cases, the D.C. Circuit applies different *Chevron* tests than those used by the Fifth Circuit here.

A. The Fifth and D.C. Circuits Reach Opposite Conclusions on Materially Identical Facts

In *MST Express v. U.S. Department of Transportation*, a statute required DOT to "prescribe regulations establishing a procedure to decide on the safety fitness of owners and operators of commercial [vehicles.]" 108 F.3d at 402. DOT responded with voluminous regulations that included safety standards in addition to those appearing in the statute. *Id.* at 402-03 (quoting eleven safety rating factors in 49 C.F.R. § Part 385 (1996)). But DOT's regulations did not state a procedure ("means of deciding") that could actually be used by the agency to determine safety fitness. *Id.* at 406. Instead, DOT's procedure appeared only in a "safety fitness rating methodology" (SFRM) manual that DOT published as an interpretation of its regulation. *Id.* at 403. A trucking business facing higher insurance premiums due to a conditional safety rating sued, claiming that DOT's regulations did not comply with the statute's regulation requirement. *Id.* at 404. The D.C. Circuit agreed, holding that Congress required regulations sufficient "to carry out" the program outlined in the statute. *Id.* at 406. DOT's regulations were insufficient because:

> A motor carrier or operator looking at the current regulations cannot determine ... what safety fitness rating it will receive. For example, it is not apparent from the regulations—as opposed to

> the SFRM—under what circumstances a carrier should expect to receive a conditional or an unsatisfactory rating. The regulations merely provide that a carrier's rating will be based upon the degree to which its safety management controls are "adequate," which the regulations define only as "appropriate for the size and type of operation of the particular motor carrier."

Id. at 406.

The FEMA regulations at issue here feature all three flaws that the D.C. Circuit held to be dispositive in *MST*. First, the FEMA regulations cannot be used "to carry out" the home repair program because no disaster survivor looking at them can determine who is eligible for assistance. 44 C.F.R. § 206.110-120. Nor can the staff of any agency or court. *See* App. 11a (The regulations do not "set out a specific procedure by which FEMA investigators will decide the question at the heart of [the Homeowners'] complaint, namely, which damages are sufficiently 'related' to the declared major disaster to make an individual or household eligible for relief.").

Second, just as DOT's safety fitness manual proved the need for standards to accomplish the statutory purpose, FEMA admits that it uses standards outside its regulations, including "deferred maintenance," to actually decide who is eligible for assistance. FEMA Answer at 4 ¶ 23. Third, FEMA's definition of "safe" in 44 C.F.R. § 206.111 is no more useful than the regulatory definition of "adequate" safety that the D.C. Circuit denounced in *MST*. *See* 106 F.3d at 406 (citing the definition of "safety ratings" in 49 C.F.R. § 385.3 (1996)).

The D.C. Circuit followed *MST* in *Ethyl Corp. v. U.S. Environmental Protection Agency*, where a statute provided that EPA "shall by regulation establish methods and procedures" to test whether emissions will remain within allowed levels over every vehicle's "useful life." 306 F.3d at 1146. EPA responded with regulations that required automobile manufacturers to devise their own emissions durability tests and subject them to EPA approval in a closed process that did not involve rulemaking. *Id.* at 1147. Fuel additive manufacturers argued that EPA's regulations failed to comply with the statute's requirement because the secret nature of test development proceedings impeded their capacity to design compliant products. *Id.* EPA responded that its regulations contained *some* testing standards and that Congress did not say how specific the required regulations must be, so courts must defer to the agency's choice of regulatory specificity under *Chevron* step two. *Id.* at 1149.

The D.C. Circuit disagreed:

> [The] challenge is not that the EPA was too general in establishing test procedures by regulation, but that it didn't establish them at all. EPA's failure to act by regulation is thus similar to, and controlled by, our decision in *MST*.

Id. at 1149 (citation omitted). The *Ethyl* court recognized that "[t]here may, of course, be cases in which it is hard" to discern whether regulations are not merely vague, but incomplete. *Id.* *Ethyl* itself was not such a hard case because the statute required testing procedures, and EPA's regulations only set out some "criteria" to be used in the tests, not the tests themselves. *Id.* at 1149-50;

see also id. at 1147 (For example, EPA regulations defined a vehicle's useful life as either 40,000 severe miles or 100,000 normal miles, and required manufacturers to base their tests on these numbers.).

The case at bar is indistinguishable from *Ethyl*. FEMA regulations add some eligibility criteria, just as EPA's added some testing criteria. Even so, FEMA's regulations cannot be used to "carry out" the home repair program because they do not disclose who is eligible "for assistance" as required by § 5174(j). FEMA can no more point to a regulation that states who is eligible for home repair assistance than EPA could point to an emissions durability test in its regulations.

The Fifth Circuit did not distinguish *MST* and *Ethyl* on their facts. Instead, it asserts that *MST* and *Ethyl* only "identify agency failures to establish rules through proper procedures, rather than failures to comply with statutory directives ...." App. 11a-12a. The D.C. Circuit says otherwise. *MST*, 108 F.3d at 406 ("We conclude that the [agency] has failed to carry out its statutory obligation to establish by regulation a means of determining whether a carrier has complied with the safety requirements of the Motor Carrier Safety Act."); *Ethyl*, 306 F.3d at 1149-50 ("[*MST*] held that the agency failed to comply with its statutory obligation [to establish standards] by regulation .... EPA's error here is similar. ... We ... remand the case to the EPA with instructions to establish test methods and procedures by regulation.").

The decision below thus creates a direct conflict in the circuits on an issue that will be of national significance in every case in which it arises.

B. The Fifth Circuit's "Add Significant Content" Test Conflicts with the D.C. Circuit's Test for *Chevron* Step One

To decide whether agencies have produced regulations as required by Congress, the D.C. Circuit begins with the following *Chevron* step-one inquiry:

> [W]e must look to the particular statutory language at issue, as well as the language and design of the statute as a whole, and we must employ traditional tools of statutory construction, including, where appropriate, legislative history.

NRDC v. EPA, 907 F.2d 1146, 1153 (D.C. Cir. 1990) (*per* Wald, C.J., joined by Williams and Ruth B. Ginsburg, JJ.) (citations omitted). Applying this test, the D.C. Circuit does more than verify that the agency has produced regulations addressing the relevant subject matter. The court examines whether the substance of the regulations achieves what Congress intended.[3] This inquiry is consequential. By it, the D.C. Circuit has rejected five different agency attempts at compliance with statutory demands for regulations. *Shays*, 528 F.3d at 931-32; *Ethyl*, 306 F.3d at 1148-50; *MST*, 108 F.3d at 405-06; *NRDC*, 907 F.2d at 1163-65; *Public Citizen*, 901 F.2d at 153-54.

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[3] *Accord Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). *Chevron* step one focuses upon whether the particular agency construction at issue "goes beyond the meaning the statute can bear." *MCI v. AT&T*, 512 U.S. 218, 229 (1994); *accord Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 481 (2001).

By contrast, the Fifth Circuit simply observed that FEMA's regulations "add significant content" to the home repair statute. App. 10a-12a. Based upon this alone, the Fifth Circuit held:

> The additional content provided by [44 C.F.R.] §§ 206.110-120 significantly narrows the universe of potentially eligible disaster victims. Accordingly, we conclude that FEMA has complied with the congressional directive by publishing these regulations and, thus, that the regulations are unobjectionable under *Chevron* step one.

App. 13a.

The Fifth Circuit did not reconcile this holding with the text, structure, history, or purpose of § 5174(j). The court only observed that the word "specific" does *not* appear in § 5174(j). App. 16a. From this, the court infers that "where Congress does not require a certain level of specificity, the agency has discretion to decide how specific its regulations will be." *Id.* But the fact that Congress did not choose a particular word is not a license to ignore the words that Congress *did* use. *See Massachusetts v. EPA*, 549 U.S. 497, 532-33 (2007); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000); *see also Lane v. Peña*, 518 U.S. 187, 212 (1996) (Stevens, J., dissenting) ("Our task ... is not to educate busy legislators on the niceties and details of scholarly draftsmanship, but rather to do our best to determine what message they intended to convey."). "Specific" did not appear in the statutes at issue in *Shays*, *Ethyl*, *NRDC*, or *Public Citizen*. This absence did not prevent the D.C. Circuit from examining the evidence of congressional intent in each

case, and holding agency attempts at regulation insufficient under *Chevron* step one.

The Fifth Circuit failed to reconcile its holding with the following indicia of Congress's intent. Had the court done so, it would have reached a different result.

1. Text—The text of 42 U.S.C. § 5174(j) requires regulations "to carry out" the home repair program. The program cannot possibly be carried out unless FEMA says who *is* eligible for assistance. *See MST*, 108 F.3d at 406 (to "carry out" a safety rating program, regulations must state the procedures that the agency uses to actually assign safety ratings); *see also Viereck v. United States*, 130 F.2d 945, 951 (D.C. Cir. 1942) ("'carry out' must mean 'make workable'"), *rev'd on other grounds*, 318 U.S. 236 (1943); WEBSTER'S NEW WORLD DICT. at 218 (2d ed. 1980) ("Carry out" means "to put instructions into practice."). By "significantly narrow[ing] the universe of potentially eligible disaster victims," *see* App. 13a, FEMA regulations at most identify some classes of people who are *not* eligible for assistance. The program cannot be carried out until FEMA defines who *is* eligible for assistance. The regulations do not answer this question.

Also, the text "criteria, standards, and procedures" requires FEMA to address three somewhat similar terms in the *conjunctive*, indicating that Congress demanded some level of detail in FEMA's regulations. *See Bennett v. Spear*, 520 U.S. 154, 173 (1997) ("[T]he cardinal principle of statutory construction [is that courts must] give effect, if possible, to every clause and word of a statute rather than ... emasculate an entire section.") (citations omitted); *accord In re Washburn*, 579 F.3d 934, 937-38 (8th Cir.

2009) (Congress placed two similar terms in close proximity "to achieve two different results.") (citations omitted).

2. Structure and History—Twelve years after Congress provided that FEMA "may" issue any regulations that it deems necessary in 42 U.S.C. § 5164, Congress provided that FEMA "shall" issue certain regulations in § 5174(j). The Fifth Circuit agreed that this history and structure can only mean that Congress intended § 5174(j) as a meaningful requirement, not merely a grant of authority. App. 6a-7a; *see also Lopez v. Davis*, 531 U.S. 230, 241 (2001) (Where the same Act contains "may" and "shall," Congress specifically intends "shall" to prescribe an agency's "discretionless obligation."). But then the Fifth Circuit dropped the matter. It never attempted to reconcile its holding with Congress's specific intent to impose a meaningful obligation upon FEMA.

Section 5174(j) imposes no meaningful obligation upon FEMA if it only requires FEMA to "add significant content" to § 5174(c)(2)(A). This is because agencies can *always* find some uncontroversial "significant content" to state in regulations. For example, no application deadline appears in the statute governing financial assistance after disasters. Assistance cannot practically be provided without a deadline, and FEMA regulations set 60 days as the standard deadline. *See* 44 C.F.R. § 206.112(a). This deadline undisputedly adds significant content to § 5174(c)(2)(A), but § 5174(j) carries little or no coercive effect if this is all that § 5174(j) requires. Indeed, FEMA regulations established the 60-day standard application deadline *prior* to enactment of § 5174(j). *See* 44 C.F.R. § 206.101(e)(1) (2000) (codifying 64 Fed. Reg. 46853 (Aug. 27, 1999)). No order from Congress was necessary to

secure a FEMA regulation setting the application deadline. Forcing FEMA to issue such ancillary eligibility regulations cannot have been Congress's objective in supplementing § 5164 with "shall" in § 5174(j). In the blunt words of the Seventh Circuit, "Congress would not bother passing such an easily circumvented law." *United States v. Hoogenboom*, 209 F.3d 665, 669 (7th Cir. 2000).

Section 5174(j) only has meaningful coercive effect if it requires FEMA to state the eligibility standards that FEMA actually uses to decide who is eligible for home repair assistance. The Fifth Circuit recognized that statutory structure and history show that Congress intended § 5174(j) to have meaningful coercive effect, and then adopted a standard that circumvents that very intent.

3. Purpose—Congress imposes statutory regulation requirements for two purposes. First, these requirements ensure that the regulated public has an opportunity to provide input through APA notice and comment, which may affect the major substantive policy choices made by agencies. *NRDC*, 907 F.2d at 1165. Second, these requirements ensure that the public knows what legal standards agencies actually use to make their decisions. *MST*, 108 F.3d at 406.

Neither purpose is served by the interpretation of § 5174(j) that FEMA offered and the Fifth Circuit accepted. This is proved by the fact that FEMA admits that it does not publish the standards that it uses to determine which damages are disaster-related. FEMA Answer at 4 ¶ 23. Policy choices such as "deferred maintenance" are absent from FEMA's regulations. Regardless of what substantive policy choices FEMA actually uses to decide which damages

are disaster-related, FEMA does not consider itself bound to subject those choices to APA notice and comment.

"Deferred maintenance" is only one example of the kinds of major substantive policy choices that are shielded from public scrutiny by FEMA's interpretation of § 5174(j).[4] Congress did not decide whether a goal of the home repair program is to return housing stock to its pre-disaster condition, or whether disasters present an opportunity for governments to alter the composition of housing stock. This decision now rests with FEMA, and it has enormous implications for the future of American cities. FEMA's interpretation of § 5174(j) would allow it to make decisions of this magnitude without APA notice and comment.

FEMA has never stated what purpose is served by its interpretation of § 5174(j). No legitimate purpose is apparent. *See Ethyl*, 306 F.3d at 1149 (rejecting an agency's construction of a regulation requirement when "it is hard to see any congressional purpose that would be served"). "By giving substantive effect to ... vague regulation[s, courts disserve] the very purpose behind the delegation of lawmaking power to administrative agencies, which is to resolve ambiguity in a statutory text." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

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[4] FEMA must make many additional policy choices before it can administer a deferred maintenance rule consistently, including: (a) how a home's pre-disaster maintenance can be reliably determined; (b) whether inability to make needed repairs prior to a disaster is distinguished from neglect; and (c) whether assistance is depreciated for deferred maintenance or denied entirely.

The text, structure, history, and purpose of § 5174(j) all show that Congress intended for FEMA to state in regulations the policy choices that it actually makes for disaster assistance eligibility. The D.C. Circuit's test for *Chevron* step one focuses upon congressional intent alone. *See also Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter[.]"). The Fifth Circuit's "add significant content" test produces the opposite result, and is untethered to Congress's intent.

C. The Fifth Circuit Refused to Apply the Reasoned Explanation Requirement that the D.C. Circuit Uses to Decide *Chevron* Step Two

Under *Chevron* step two, the D.C. Circuit requires agencies to explain their choices of regulation specificity. The Fifth Circuit held that *Chevron* step two contains no such requirement.

When regulations are challenged as excessively vague, the D.C. Circuit requires agencies to explain why under *Chevron* step two. *Shays*, 528 F.3d at 931-32 (rejecting a regulation for unexplained vagueness under *Chevron* step two); *see also Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 949 (D.C. Cir. 2004) ("Without a readily accessible statement of the agency's rationale, [neither] interested parties [nor] the courts [can] determine whether the agency['s] statutory interpretation is reasonable under *Chevron's* second step.").

Often agencies have good reasons for regulatory vagueness. *See, e.g., Cement Kiln*, 493 F.3d at 219-23 (Where vague regulations affected only a small share of the cases for which regulations were required, and a permitting process covered that small share of cases,

the agency "reasonably explained" its choice of regulatory specificity.); *American Trucking*, 166 F.3d at 380 (Additional regulatory specificity is not "feasible" in light of the agency's "highly specific" regulatory effort.);[5] *New Mexico*, 114 F.3d at 293 (Where a statute required radioactive material storage regulations to address contingencies over a period of ten thousand years, the court deferred to the agency's technical expertise as to how specific regulations could be.); *Consumer Federation of Am.*, 83 F.3d at 1504-05 ("HHS has provided a coherent explanation for why [additional regulatory specificity would not be] useful or manageable ....").

By contrast, the Fifth Circuit recognized that some of FEMA's eligibility regulations are "especially vague," but it refused to require FEMA to explain why. App. 14a-15a. The court held that *Chevron* step two requires a reasoned explanation for regulatory vagueness only if a statute explicitly demands the explanation, or if an agency changes prior policy. *Id.* The D.C. Circuit cases cited in the previous paragraph do not impose these limits on the reasoned explanation requirement.

This Court explained the function of the reasoned

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[5] *American Trucking* is the sequel to *MST*. In response to *MST*, DOT adopted "highly specific" safety regulations explaining "exactly how" the agency decided what is "safe." *Id.* at 377-79. Businesses argued that the new regulations were still too vague because they did not state how many documents would be examined during each safety review, or how the agency selected which documents to examine. *Id.* at 379. The D.C. Circuit rejected this challenge under *Chevron* step two and *Guernsey*, observing that agencies cannot feasibly state every conceivable detail of their practices in regulations. *Id.* at 380.

explanation requirement in *State Farm*:

> [An] agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

463 U.S. at 43. A recognized authority surveys the cases and succinctly concludes, "*Chevron* step two is *State Farm*." 1 R. PIERCE, ADMINISTRATIVE LAW TREATISE § 3.6 at 218-19 (5th ed. 2010).

State Farm's "reasoned explanation" requirement derives from the APA's "arbitrary and capricious" standard alone. *Id.*; *see* 5 U.S.C. § 706(2)(A). All regulations are subject to this reasoned explanation requirement, regardless of whether the statute authorizing the regulation also states the requirement. This Court enforced the APA's reasoned explanation requirement where the enabling act at issue, 15 U.S.C. § 1381, *et seq.*, did not contain one. *See State Farm*, 463 U.S. at 33. This Court recently held that *State Farm's* rational-basis requirement applies

equally to regulations stating new policies and to changes in prior policy. *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1810-11 (2009) ("[O]ur opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.") (per Scalia, J.). The Fifth Circuit's holding cannot be reconciled with this precedent.

Under *Chevron* step two, courts defer to any "permissible" agency interpretation of an ambiguous statute. *Chevron*, 467 U.S. at 843. An interpretation is not "permissible" if it "frustrate[s] the policy that Congress sought to implement." *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 31-32 (1981). Vague regulations may frustrate the policy that Congress sought to implement. *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 392 (1999) (*Chevron* step two requires agencies to "apply *some* limiting standard, rationally related to the goals of the Act," defining statutory terms as broad as "necessary" and "impair."); *accord Shays*, 528 F.3d at 931.

FEMA's regulations are "especially vague." App. 16a. FEMA offers no reasoned explanation why. FEMA has not simply omitted a few details from a highly specific set of regulations as in *Guernsey* or *American Trucking*, it omits core details from what all courts agree is a "rather poor" regulatory effort overall. *See* App. 16a n.3. The subjects upon which additional specificity is needed are not small details that only matter in some cases as in *Cement Kiln*, but first-order subjects that must be addressed in every case before anyone can ever be deemed eligible for home repair assistance. The need for additional

specificity is foreseeable, for FEMA has actually recognized this need and responded to it by developing additional eligibility standards outside regulations. App. 98a-100a; FEMA Answer at 4 ¶ 23. Additional regulatory specificity is not technically impossible as in *New Mexico*, for other agencies have produced housing safety standards in regulations. *See, e.g.*, 24 C.F.R. § 982.401 (2000) (HUD); 7 C.F.R. § 3560.103 (2005) (USDA).

* * * * *

In sum, under *Ethyl*, *MST*, and the *Chevron* analysis employed by the D.C. Circuit, FEMA's regulations are facially insufficient to satisfy the statutory requirement for regulations that appears in 42 U.S.C. § 5174(j). The Fifth Circuit's decision conflicts with the D.C. Circuit's jurisprudence. The D.C. Circuit's unique exposure to administrative law and its long history of considering the issue indicate that no purpose would be served by postponing resolution of this split.

II. This Case Presents Issues of National Importance that Should be Settled by This Court

The Fifth Circuit's decision merits plenary review because of its undesirable and far-reaching practical consequences.

A. The Decision Below Allows FEMA to Engage in Arbitrary Conduct

The immediate practical consequence of the Fifth Circuit's decision will be to allow arbitrary distribution of financial assistance. The Fifth Circuit explicitly allowed

FEMA to have its staff distribute money when they believe that disaster-related damages have made a home unsafe, without further guidance as to the meaning of "disaster-related" and "unsafe." App. 16a. ("Given the nature of FEMA's work and the compressed time it has to make individual determinations, the agency requires relatively wide discretion for the ground-level workers who make initial assistance decisions.").

In *Morton v. Ruiz*, this Court held that such wide discretion in making financial assistance determinations is inherently arbitrary:

> [Congress empowered the agency] to create reasonable classifications and eligibility requirements in order to allocate the limited funds available [for a program's] purpose. [Where available funds are insufficient to meet anticipated applications], it would be incumbent upon the [agency] to develop an eligibility standard to deal with this problem, and the standard, if rational and proper, might leave some of the class otherwise encompassed by the appropriation without benefits. But in such a case the agency must, at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries.

415 U.S. at 230-32 (citations omitted); *see also South Terminal Corp. v. EPA*, 504 F.2d 646, 670 (1st Cir. 1974) ("[T]he standard is so vague that it invites arbitrary and unequal application. [T]hose regulated should understand

how the judgment will be made, so that they can be intelligent participants in the process.").

The Fifth Circuit attempts to distinguish *Morton* as a "pre-*Chevron* case," App. 13a, but *Chevron* itself cites *Morton* with approval. 467 U.S. at 843. The Fifth Circuit also asserts that *Morton* can only apply if the Homeowners prove that FEMA actually uses unpublished criteria to make eligibility determinations. App. 14a n.2. But FEMA distributed $25 million in housing assistance following Hurricane Dolly. App. 2a. FEMA's regulations are so indeterminate on their face that FEMA could have only distributed this money on an *ad hoc* basis or by using unpublished eligibility criteria, both of which are proscribed by *Morton*. *See Morton*, 415 U.S. at 232 ("[The APA] was adopted to provide, inter alia, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations.").

The nature of FEMA's work does not distinguish *Morton*. *See Mahon v. U.S. Dept. of Agric.*, 485 F.3d 1247, 1259-60 (11th Cir. 2007) (USDA may not arbitrarily distribute disaster assistance to farmers.). Major disasters feature a unique combination of statistical foreseeability (over a dozen per year) and unforeseeability in timing, location, and nature. When Congress required regulations in § 5174(j), it plainly concluded that advance statement of standards for federal *financial assistance* was feasible and necessary. Other forms of federal assistance, such as emergency shelter, are governed by separate parts of the Stafford Act that conspicuously *lack* any regulation requirement. *See* 42 U.S.C. § 5170b.

Moreover, FEMA relies upon the nature of its work to publish regulations and subject them to post-publication APA compliance procedures as necessary. 44 C.F.R. § 1.4(f)-(h). Thus, whenever FEMA communicates its eligibility standards to its "ground-level workers," it faces no practical impediment to simultaneously publishing its standards so that the regulated public may know them as well.

The reasoning in *Morton* applies in full to FEMA's conduct here. The arbitrary administration of disaster assistance that the Fifth Circuit explicitly allows has devastating consequences for the fair administration of disaster assistance to untold thousands of families.

B. The Decision Below Allows Agencies to Use Parroting Regulations to Bypass the APA

In *Gonzales v. Oregon*, this Court refused to defer to an agency interpretation of a regulation that repeated statutory text:

> Since the regulation gives no indication how to decide this issue, the [agency's] effort to decide it now cannot be considered an interpretation of the regulation. Simply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.

546 U.S. 243, 257 (2006). All three Justices who dissented in *Gonzales* have since joined opinions that apply the anti-parroting canon. *Kentucky Ret. Sys. v. EEOC*, 128 S. Ct. 2361, 2370 (2008); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 42 (2007) (Stevens, J., dissenting).

Gonzales's anti-parroting canon prevents agencies from "bypass[ing] meaningful rule-making procedures by simply adopting an informal 'interpretation' of regulatory language taken directly from the statute in question." *Haas v. Peake*, 525 F.3d 1168, 1186-87 (Fed. Cir. 2008); *see also Caruso v. Blockbuster-Sony Music Ent. Centre*, 193 F.3d 730, 733-37 (3d Cir. 1999) (per Alito, J.) (DOJ may not bypass the APA by interpreting its vague regulation after declining to decide the policy question in the regulation itself.); 1 R. PIERCE, ADMINISTRATIVE LAW TREATISE § 6.4 at 452-53 (5th ed. 2010) (collecting cases).

The Fifth Circuit recognized that FEMA regulations parrot the statutory term "disaster-related," and FEMA found the Homeowners ineligible based upon its interpretation of "disaster-related." App. 11a-12a; 101a-106a. Still, the court held that *Gonzales's* anti-parroting canon only applies to *interpretations* of parroting regulations, and does not prevent all agency use of parroting regulations. *Id.* The court allowed FEMA to use parroting regulations to satisfy the statutory demand for regulations that appears in § 5174(j), without ever addressing the APA rationale that underlies the anti-parroting canon. *Id.*

No other court of appeals has allowed an agency to use a parroting regulation for anything. *See, e.g., Pittsburgh & Midway Coal Mining Co. v. OWCP*, 508 F.3d 975, 983 n.6 (11th Cir. 2007) ("[I]t would be odd to refuse significant

deference to an interpretation under *Gonzales*, yet give the same interpretation traditional *Chevron* deference."); *In re Kaiser Alum. Corp.*, 456 F.3d 328, 345-46 & n.12 (3d Cir. 2006) (A parroting regulation says nothing about the agency's position.); *Pearson v. Shalala*, 164 F.3d 650, 660-61 (D.C. Cir. 1999) ("[W]e are quite unimpressed with the government's argument that the agency is justified in employing this standard without definition because Congress used the same standard in [the statute.]); *Parker v. Office of Personnel Management*, 974 F.2d 164, 168 (Fed. Cir. 1992) (A parroting regulation is but a "nonexistent interpretation" of a statute.") (quotation omitted).

Gonzales's anti-parroting canon has proved to be an effective means of preventing agencies from bypassing APA rulemaking requirements. The Fifth Circuit states no reason for artificially limiting its scope. No legitimate congressional purpose could be served by allowing agencies to satisfy statutory demands for regulations by repeating statutory text. This Court should not tolerate the uncertainty and license wrought by the Fifth Circuit's refusal to apply *Gonzales*.

C. The "Add Significant Content" Test Allows Agencies to Undermine Statutory Demands for Regulations

Finally, the Fifth Circuit's decision merits review because it provides a blueprint for how agencies can avoid statutory demands for regulations. *See Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) (A circuit's "precedent [may] prove disruptive by too readily permitting other agencies to depart from uniform APA requirements."). For example, if Congress required an agency to set baseball rules by

regulation, the agency could state that teams must wear uniforms of different colors and an infield-fly rule applies. The agency could then cite the decision below to claim that these two "significant" rules of the game suffice for *Chevron* despite their facial incompleteness. The teams would arrive in different uniforms knowing to watch for the umpire's raised arm, but the regulations would not provide the rules needed to begin the game.

Congress has demanded regulations in recent major financial services, health care, and campaign finance legislation. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, § 805(a)(1) (2010) ("[T]he Board of Governors, by rule or order ... shall prescribe risk management standards [governing] the operations related to the payment, clearing, and settlement activities of designated financial market utilities."); Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 132, § 2714(b) (2010) ("The Secretary shall promulgate regulations to define the dependents to which coverage shall be made available under [the prior section]."); McCain-Feingold Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, 95 § 214(c) (2002) ("The Federal Election Commission shall promulgate new regulations on coordinated communications paid for by persons other than candidates, and party committees."). These congressional directives and many others are undermined if agencies may claim compliance by merely adopting regulations that "add significant content."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST 2010

APPENDIX A

[608 F.3d 217]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-40948

LA UNION DEL PUEBLO ENTERO; FRANCISCA ADAME; ALEJANDRO ALVARADO; ELIZABETH ALVARADO; MANUEL BENAVIDEZ; MARIA GALARDO; JOSE GONZALES; AUGUSTINA IGLESIAS; NOE JIMENEZ; VERONICA JIMENEZ; ERNESTO LOPEZ; NORMA LOPEZ; FRANCISCA PEREZ; ROSA ELIA VILLARREAL; CRUZ ALEJANDRO ZAMORA, Plaintiffs - Appellees v. FEDERAL EMERGENCY MANAGEMENT AGENCY, Defendant - Appellant

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June 2, 2010

Appeal from the United States District Court for the Southern District of Texas

Before GARZA, DeMOSS, and CLEMENT, Circuit Judges.

[218] EMILIO M. GARZA, Circuit Judge:

At issue in this case is the Federal Emergency Management Agency's (FEMA) administration of the home repair provisions of Section 408 of the Stafford Act, entitled "Federal Assistance to Individuals and Households" and codified at 42 U.S.C. § 5174. The district court issued a preliminary injunction requiring FEMA to publish standards that comply with § 5174(j). FEMA appealed, and this court issued a stay of the injunctive relief pending the outcome of the appeal. We now vacate the district court's grant of injunctive relief and remand the case.

I

This suit arose in the wake of Hurricane Dolly, which damaged thousands of homes in the Rio Grande Valley. President Bush declared Dolly a major disaster, and FEMA made available housing assistance, including home repair under § 5174. More than 38,000 families sought assistance from FEMA, which approved the distribution of $ 30 million under its "Individuals and Households Programs," including $ 25 million for housing assistance.

FEMA denied assistance to numerous homeowners, often by sending written explanation that denial was due to "insufficient damage" because "[b]ased on your FEMA inspection, we have determined that the disaster has not caused your home to be unsafe to live in. This determination was based solely on the damage to your home that are [sic] related to this disaster." The plaintiffs in this case comprise homeowners and a group representing homeowners who unsuccessfully challenged FEMA's determinations through the administrative

appeals process.

Plaintiffs then filed the instant suit, pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq. The Complaint alleges that FEMA violated 42 U.S.C. §§ 5151(a) and 5174(j) "by failing to adopt and implement ascertainable standards necessary to insure that housing repair assistance under 42 U.S.C. § 5174(c)(2) is made available to victims of Hurricane Dolly in an equitable and impartial manner." It also alleges that FEMA's use of an unpublished "deferred maintenance policy" violates 42 U.S.C. § 5151(a) by promoting economic discrimination. FEMA's failure to publish and apply ascertainable standards, Plaintiffs assert, is the proximate cause of ongoing irreparable injuries to Plaintiffs and their families.

[219] Plaintiffs sought only injunctive relief. They asked the district court to: (1) "enjoin FEMA to publish and apply ascertainable standards to make its housing repair assistance decisions"; (2) "enjoin FEMA to reconsider all denials of housing repair assistance for Disaster No. 1780 [Hurricane Dolly] using the [new standards]"; (3) "enjoin FEMA to provide timely and adequate notice of its actions to applicants for home repair assistance"; and (4) "award Plaintiffs their costs and litigation expenses."

The district court granted a preliminary injunction based on § 5174(j), which the court found established mandatory, affirmative requirements on FEMA. The court rejected Plaintiffs' theory based on § 5151(a), which it found imposed only a discretionary burden on FEMA. The court noted that § 5174(j) "does not contain the same discretionary language," and that, while FEMA had

"discretion to determine the content and specificity of the eligibility requirements," FEMA's housing eligibility regulations simply duplicated and failed to supplement the enabling statute. Section 5174(j), the court explained, "necessitates that FEMA's regulations include further criteria and standards of eligibility beyond those identified by federal law."

The district court performed the required preliminary injunction balancing test, finding that Plaintiffs had a likelihood of success on the merits, that there was a substantial threat that Plaintiffs would suffer irreparable injury without the injunction, that the threatened injury to Plaintiffs outweighed the damage the injunction would cause FEMA, and that the public interest favored the injunction. The court found "that if FEMA were to outline more specific criteria and standards for eligibility, decisions made by FEMA implementing eligibility requirements could increase the relief awards granted to some or many of the Plaintiffs, which would alleviate their injuries."

Having determined that a preliminary injunction was appropriate, the court enjoined FEMA to:

> (1) publish definite and ascertainable criteria, standards, and procedures for determining eligibility for relief assistance beyond which is identified [sic] by federal law in compliance with the congressional mandate found in 42 U.S.C. § 5174(j); and
>
> (2) reconsider Plaintiffs' applications for housing relief assistance for damage from Hurricane Dolly, Disaster No. 1780, using the ascertainable criteria,

> standards, and procedures for determining eligibility for relief assistance published in compliance with paragraph 1.
>
> (3) within sixty (60) days of entry of this Order, file a proposed plan by which FEM A will comply with this Order, including what specific actions it plans and its proposed dates for completing each action. Plaintiffs shall have twenty (20) days to respond to FEMA's proposed plan with any objections.

FEMA filed an interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1) and moved to stay the injunction in this court. We granted the motion to stay and sua sponte expedited the appeal.

II

A preliminary injunction is an extraordinary remedy that should only issue if the movant shows: (1) a substantial likelihood of prevailing on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) the threatened injury outweighs any harm that will result to the non-movant if the injunction is granted; and (4) the injunction will not disserve the public interest. *Ridgely v. Fed. Emergency Mgmt. Agency*, 512 F.3d 727, 734 **[220]** (5th Cir. 2008). "Although the ultimate decision whether to grant or deny a preliminary injunction is reviewed only for abuse of discretion, a decision grounded in erroneous legal principles is reviewed de novo." *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009) (quotation omitted). "Each element of the injunction analysis typically involves questions of fact and law. The factual components of the decision

are subject to a clearly-erroneous standard of review," while legal conclusions "are subject to broad review and will be reversed if incorrect." *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989) (citations and quotation omitted).

III

A

In their briefing, the parties primarily debate the district court's finding that Plaintiffs demonstrated a likelihood of success on the merits. We likewise find that this issue, which turns on whether FEMA has complied with § 5174(j), resolves the appeal.

Initially, the parties dispute whether § 5174(j) is a requirement to prescribe certain rules or a grant of authority that FEMA may or may not exercise. We agree with Plaintiffs that § 5174(j) requires FEMA to promulgate regulations. Subsection (j) is phrased in mandatory language, in contrast to other parts of the Stafford Act that give FEMA discretion about what regulations to create. Compare 42 U.S.C. § 5164 ("The President may prescribe such rules and regulations as may be necessary and proper to carry out the provisions of this chapter . . . ." (emphases added)), with *id.* § 5174(j) ("The President shall prescribe rules and regulations to carry out this section, including criteria, standards, and procedures for determining eligibility for assistance." (emphasis added)). If § 5174(j) leaves the decision whether to promulgate regulations within FEMA's discretion, it adds nothing to the statutory scheme in light of the agency's general discretion to make "such rules and regulations as may be necessary" granted by

§ 5164. Because we cannot presume that § 5174(j) is meaningless, we conclude that the section must impose some requirement on FEMA to promulgate, inter alia, housing eligibility regulations.

Having concluded that § 5174(j) is a requirement to prescribe certain rules rather than a grant of authority that FEMA may or may not exercise, we turn to the critical issue in this case: whether FEMA has complied with § 5174(j). In 2002, FEMA published an "interim final rule," which, according to FEMA, contains the regulations called for by § 5174(j). See 44 C.F.R. §§ 206.110-206.120. The parties vigorously dispute the extent to which the regulations set forth ascertainable criteria, standards, and procedures for determining housing assistance eligibility.

Chevron provides the framework for our analysis of agency regulations. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). So long as an agency does not cross certain judicially patrolled boundaries, the agency's exercise of its delegated power should receive deference from the courts. The *Chevron* analysis proceeds in two steps. The first determines whether Congress intended to give the agency any discretion. Under *Chevron* step one, "a reviewing court must first ask whether Congress has directly spoken to the precise question at issue. If Congress has done so, the inquiry is at an end; the court must give effect to the unambiguously expressed intent of Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (citations and quotations omitted). "But if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction

of the statute so long as it is permissible." *Id.* This leads to *Chevron* step two: the court defers to the agency's construction so long as agency regulations are not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

Plaintiffs primarily argue that FEMA's action fails *Chevron* step one because Congress has specifically directed FEMA to "prescribe rules and regulations to carry out this section [5174], including criteria, standards, and procedures for determining eligibility for assistance" and FEMA has failed to comply with this directive. FEMA responds that it complied with the Congressional directive by publishing the C.F.R. materials and directs the majority of its argument to the discretion provided by *Chevron* step two.

The § 5174 regulations that FEMA properly promulgated through the notice and comment rulemaking process do establish – though sometimes imprecisely – criteria, standards, and procedures for determining eligibility for FEMA aid. Section 206.110 of the regulations sets certain limitations on the Stafford Act assistance program for individuals and households, including the maximum amount of assistance available, the date of eligibility for relief, and the length of time assistance is available. Section 206.111 defines a number of terms used in the home repair regulations, including "owner-occupied," "occupant," "primary residence," "safe," and "sanitary." Section 206.112 establishes the initial registration period for disaster relief and the procedures for extending the registration period and for the acceptance of late registrations. Section 206.113 lists a number of "eligibility factors," including specific

eligibility limits based on insurance coverage. Section 206.114 sets out a documentation requirement for individuals who request ongoing repair assistance. Section 206.115 creates an appeals process for applicants FEMA finds ineligible.

Section 206.117, the main regulation at issue here, deals with housing assistance. It is divided into subsections covering the three main types of housing assistance FEMA offers: temporary housing assistance (either rental money or temporary housing structures), home repair--the subsection Plaintiffs complain is inadequate--and home replacement. The "repair" subsection states that FEMA "may provide financial assistance for the repairs of uninsured disaster-related damages to an owner's primary residence," and that any funds provided are to be used to "help return owner-occupied primary residences to a safe and sanitary living or functioning condition." 44 C.F.R. § 206.117(b)(2)(i). It also notes that repairs "may include utilities and residential infrastructure. . . damaged by a major disaster." *Id.* Additional repair regulations allow eligible individuals or households to receive the first $ 5,000 in assistance with a simple showing that they are uninsured, *id.* § 206.117(b)(2)(iv), but require the individual or household to obtain the permits and inspections required by state law before making repairs, *id.* 206.117(b)(2)(v). A separate section on "eligible costs" states that "repairs . . . must be disaster-related and must be of average quality, size, and capacity, taking into consideration the needs of the occupant. Repairs to the primary residence are limited to restoration of the dwelling to a safe and sanitary living or functioning

condition." *Id.* § 206.117(c)(1). Finally, the regulations list the kinds of repairs for which compensation **[222]** is available.[1]

These regulations add significant content to the "repairs" subsection of the statute, which provides as follows:

> The president may provide financial assistance for–
>
> (i) the repair of owner-occupied private

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[1] *See* 44 C.F.R. §§ 206.117(c)(1)(i)-(viii):

> (i) Repair or replacement of the structural components, including foundation, exterior walls, and roof;
> (ii) Repair or replacement of the structure's windows and doors;
> (iii) Repair or replacement of the structure's Heating, Ventilation and Air Conditioning System;
> (iv) Repair or replacement of the structure's utilities, including electrical, plumbing, gas, water and sewage systems;
> (v) Repair or replacement of the structure's interior, including floors, walls, ceilings, doors and cabinetry;
> (vi) Repair to the structure's access and egress, including privately owned access road and privately owned bridge;
> (vii) Blocking, leveling, and anchoring of a mobile home, and reconnecting or resetting mobile home sewer, water, electrical and fuel lines and tanks; and
> (viii) Items or services determined to be eligible hazard mitigation measures.

> residences, utilities, and residential infrastructure (such as a private access route) damaged by a major disaster to a safe and sanitary living or functioning condition; and
>
> (ii) eligible hazard mitigation measures that reduce the likelihood of future damage to such residences, utilities, or infrastructure.

42 U.S.C. § 5174(c)(2)(A). Admittedly, as Plaintiffs point out, the regulations do not elaborate with specificity the statutory phrase "damaged by a major disaster"; section 206.117(b)(2)(i) uses the term "disaster-related damages." Nor do they set out a specific procedure by which FEMA investigators will decide the question at the heart of Plaintiffs' complaint, namely, which damages are sufficiently "related" to the declared major disaster to make an individual or household eligible for relief. But, as FEMA points out, this is a complaint that the regulations lack specificity, not that FEMA wholly abdicated its responsibility to promulgate regulations, or promulgated regulations that directly contravene the statutory language.

The cases Plaintiffs rely on to press their *Chevron* step one argument do not convince us that FEMA has failed to follow the congressional directive established by § 5174(j). The first set of cases Plaintiffs use for support--mainly *Ethyl Corp. v. EPA* and *MST Express v. Department of Transportation*–identify agency failures to establish rules through proper procedures, rather than failures to comply with statutory directives to elaborate regulations with a certain level of specificity. *Ethyl Corp.*, 306 F.3d 1144, 353 U.S. App. D.C. 318 (D.C. Cir.

2002) (noting importance of "by regulation" language in statute); *MST Express*, 108 F.3d 401, 323 U.S. App. D.C. 347 (D.C. Cir. 1997) (invalidating the Federal Highway Administration's safety fitness rating method because it relied on guidelines that were not the result of notice and comment rulemaking).

Plaintiffs cite a second group of cases for the proposition that regulations that merely "parrot" the statutes they seek to implement are invalid. Although these cases contain language supporting Plaintiffs' position, we do not find them entirely applicable to this appeal. These cases stand not for the proposition that "parroting" regulations are necessarily invalid, but rather for the proposition that an agency is not entitled to additional deference when its "interpretation" of the statute simply repeats the statute's language. See *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) ("An agency does not acquire special authority **[223]** to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."). Plaintiffs' reliance on the "parroting" cases would be more apposite if FEMA were claiming that additional deference was due simply because FEMA issued regulations repeating the statutory language. The cases do not, however, suggest that "parroting" regulations are per se invalid nor that parroting alone necessarily invalidates the regulations.

In short, although the C.F.R. materials do not lay out the "criteria, standards, and procedures for determining eligibility for assistance" with as much specificity as might be desired, we cannot conclude that

the regulations contravene Congress's directive to issue eligibility regulations. The additional content provided by §§ 206.110-206.120 significantly narrows the universe of potentially eligible disaster victims. Accordingly, we conclude that FEMA has complied with the congressional directive by publishing these regulations and, thus, that the regulations are unobjectionable under *Chevron* step one.

The second step in determining whether FEMA's regulations constitute a permissible interpretation of § 5174 requires us to consider whether the regulations are "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. If not, they are entitled to judicial deference.

Plaintiffs argue that the regulations lack specificity and lead the agency to make arbitrary disaster assistance decisions. Their contention is, at its core, that the regulations are so vague that the court should consider them arbitrary or capricious.

Plaintiffs contend that the regulations are invalid under *Morton v. Ruiz*, a pre-*Chevron* case, because they are too vague to prevent FEMA from making inherently arbitrary ad hoc determinations. 415 U.S. 199 (1974). In *Morton*, the Court's statement that "the determination of eligibility cannot be made on an ad hoc basis by the dispenser of the funds" was premised on the fact that the agency had "chosen not to publish its eligibility requirements . . . in the Federal Register or in the CFR." 415 U.S. at 232, 234. Unlike the agency in Morton, which did not promulgate the rule in question, FEMA has published its regulations in the Federal Register and

the C.F.R. Thus, *Morton* does not control this case.[2]

Second, Plaintiffs claim that *Shays v. FEC* and *Northeast Maryland Waste Disposal Authority v. EPA*, both from the D.C. Circuit, show that agencies must support their regulations with explicitly stated reasoning and evidence to survive *Chevron* step two. *Shays*, 528 F.3d 914 (D.C. Cir. 2008); *Ne. Md. Waste Disposal Auth.*, 358 F.3d 936 (D.C. Cir. 2004). In *Shays*, the FEC was under a statutory directive to provide a "detailed explanation and justification" for its campaign finance regulations. See 2 U.S.C. § 438(d)(1). Further, since the FEC was changing its prior policy, it was under a general obligation that "an agency choosing to alter its regulatory course must supply a reasoned analysis indicating that its prior policies and standards are being deliberately changed, not casually ignored." *Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 687 (5th Cir. 2000) (quotation omitted). *Shays* is inapplicable because the regulations at issue here have not been amended in a way that would require a "reasoned analysis," and **[224]** there is no equivalent statutory requirement that FEMA issue an "explanation and justification" for its regulations. In *Northeast Maryland Waste Disposal Authority*, the statute at issue specifically required a "'statement of . . . basis and purpose' that includes a summary of 'the major legal interpretations and policy considerations underlying' the rule." 358 F.3d at 948-49 (citing 42 U.S.C. § 7607(d)(3), (d)(6)(A)). *Northeast Maryland Waste*

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[2] If on remand Plaintiffs are able to establish that FEMA makes eligibility determinations using non-published criteria, then *Morton* would become more relevant.

Disposal Authority is inapplicable because § 5174 does not require FEMA to prepare a similar statement to accompany its regulations.

In contrast with the cases Plaintiffs rely on, the D.C. Circuit's decision in *American Trucking Associations v. Department of Transportation* better fits the facts presently before the court. 166 F.3d 374 (D.C. Cir. 1999). In *American Trucking*, industry groups challenged regulations establishing a safety fitness rating as insufficiently specific. *Id.* at 378. The enabling legislation required the agency to "maintain by regulation a procedure for determining the safety fitness" of motor carriers, which had to include "specific initial and continuing" safety requirements. *Id.* The court noted that "[t]he *Chevron* test applies to issues of how specifically an agency must frame its regulations," and held that since the statute's language did not identify the degree of specificity required in the regulations, the relevant question was whether the regulations reasonably provided a methodology for determining the safety level of carriers. *Id.* at 378-79. The court approved the regulations, explaining that its caselaw "explicitly accorded agencies very broad deference in selecting the level of generality at which they will articulate rules." *Id.* at 379; *see also Metro. Wash. Airports Auth. Prof'l Fire Fighters Ass'n v. United States*, 959 F.2d 297, 300 (D.C. Cir. 1992) (upholding a lease that did not address employee rights in greater detail than the enabling legislation because "judicial deference is at its highest in reviewing an agency's choice among competing policy considerations, including the choice here of the level of generality at which it will promulgate norms implement-

ing a legislative mandate" (citation omitted)).

Plaintiffs attempt to distinguish *American Trucking* on the ground that the new regulations were highly specific and gave much more guidance to the regulated parties than FEMA's regulations gave to Plaintiffs. Although Plaintiffs are correct on the facts, the statute at issue in *American Trucking* explicitly called for "specific initial and continuing" safety requirements. *Id.* at 378 (emphasis added). Section 5174 does not set out a given level of specificity that FEMA's regulations must meet. *American Trucking* thus supports FEMA's position that, where Congress does not require a certain level of specificity, the agency has discretion to decide how specific its regulations will be.

Ultimately, Plaintiffs' "specificity" argument is a difficult one to make. A regulation could always be more specific, and so it will always contain some vagueness that vests on-the-ground personnel with a level of discretion. FEMA's regulations for housing repair assistance are especially vague about the meaning of "disaster-related." Indeed, they do not venture beyond the statutory language. But this vagueness does not automatically mean the regulations are invalid. Given the nature of FEMA's work and the compressed time it has to make individual determinations, the agency requires relatively wide discretion for the ground-level workers who make initial assistance decisions.[3]

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[3] This, of course, does not mean that the regulations cannot be improved. Even FEMA seems to implicitly recognize that they are rather poor, and this court explicitly criticized them in *Ridgely*. One hopes that the new regulations FEMA is consider-

[225] In conclusion, we hold that the district court abused its discretion in issuing the preliminary injunction. The award of preliminary injunctive relief is an extraordinary remedy that should only issue if the movant shows a substantial likelihood of prevailing on the merits. *Ridgely*, 512 F.3d at 734. Here, Plaintiffs cannot show a substantial likelihood of prevailing on the merits because the law on the question at the heart of the dispute does not favor their position. Thus, even if Plaintiffs have some chance of prevailing after an adjudication on the merits, the preliminary injunction was issued in error.

B

Because we have determined that Plaintiffs cannot show a substantial likelihood of success on the merits, we need not address FEMA's additional arguments regarding the other necessary elements for preliminary injunctive relief. The holding on the initial element is sufficient to vacate the injunction.

C

Plaintiffs have also asked this court to exercise its discretion to address an alternate ground for deciding in their favor that the district court has yet to rule on. Plaintiffs contend that FEMA has admitted that it used an unpublished "deferred maintenance" rule to decide which homes were damaged by the hurricane. This, they argue, runs afoul of 5 U.S.C. § 552(a)(1).

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ing will give affected parties more guidance about whether the damage to their homes will count as "disaster-related."

We decline to address Plaintiffs' § 552(a)(1) argument. Our review of the record does not indicate that it has been definitively established that FEMA denies assistance wholly on the basis of an unpublished "deferred maintenance" rule. We note, however, that our decision not to address Plaintiffs' § 552(a)(1) argument in no way reflects our view of the argument's merit. We express no opinion on the merits at this time, deciding instead to avoid improper appellate fact finding and to leave the initial decision to the district court.

IV

For the foregoing reasons, we VACATE the preliminary injunction and REMAND the case to the district court for further proceedings.

APPENDIX B

[Unpublished Order, Record USCA5 515-16]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

No. B-08-487

LA UNION DEL PUEBLO ENTERO, ET AL.,
Plaintiffs,
v.
FEDERAL EMERGENCY MANAGEMENT AGENCY,
Defendant.

Entered August 7, 2009

PRELIMINARY INJUNCTION

[Hon. Hilda G. Tagle, United States District Judge]

BE IT REMEMBERED, that on August 6, 2009, the Court considered its Opinion and Order, Dkt. No. 22, Plaintiffs' Motion for Entry of Injunction, Dkt. No. 23, Defendant's Response to Plaintiffs' Motion for Entry of Injunction, Dkt. No. 25, and Plaintiffs' Reply Supporting Plaintiffs' Motion for Entry of Injunction, Dkt. No. 26.

As explained in this Court's Opinion and Order concerning Plaintiffs' Motion for a Preliminary Injunction, Defendant Federal Emergency Management Agency ("FEMA") failed to issue criteria, standards, and procedures by which eligibility for FEMA programs is measured as mandated by Congress in 42 U.S.C. § 5174(j)). Dkt. No. 22, at 10-11. Therefore, the Court ordered that "FEMA shall issue Rules and Regulations that outline definite and ascertainable criteria, standards, and procedures for determining eligibility for relief assistance beyond which is identified by federal law in compliance with the congressional mandate found in 42 U.S.C. § 5174(j))." *Id.* at 15. The Court determined that an injunction was an appropriate remedy because Plaintiffs established that they had suffered harm and would continue to suffer irreparable injuries absent an injunction. *Id.* at 13.

Pursuant to Rule 65 of the Federal Rules of Civil Procedure this Court **ORDERS** that FEMA:

(1) publish definite and ascertainable criteria, standards, and procedures for determining eligibility for relief assistance beyond which is identified by federal law in compliance with the congressional mandate found in 42 U.S.C. § 51740); and

(2) reconsider Plaintiffs' applications for housing relief assistance for damage from Hurricane Dolly, Disaster No. 1780, using the ascertainable criteria, standards, and procedures for determining eligibility for relief assistance published in compliance with paragraph 1[; and]

(3) within sixty (60) days of entry of this Order, file a proposed plan by which FEMA will comply with this Order, including what specific actions it plans and its proposed dates for completing each action. Plaintiffs shall have twenty (20) days to respond to FEMA's proposed plan with any objections.

DONE at Brownsville, Texas, on August 6, 2009.

/s/

Hilda G. Tagle

United States District Judge

APPENDIX C

[2009 WL 1346030]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

No. B-08-487

LA UNION DEL PUEBLO ENTERO, ET AL.,
Plaintiffs,
v.
FEDERAL EMERGENCY MANAGEMENT AGENCY,
Defendant.

Entered May 13, 2009

OPINION & ORDER

[Hon. Hilda G. Tagle, United States District Judge.]

BE IT REMEMBERED, that on May 13, 2009, the Court DENIED Defendant's Motion to Dismiss, Dkt. No. 17, and GRANTED Plaintiffs' Motion for a Preliminary Injunction, Dkt. No. 2[.]

I. Background

Plaintiffs La Union del Pueblo Entero, Noe Jimenez, Veronica Jimenez, Ernesto Lopez, Norma Lopez, Francisca Perez, Rosa Elia Villarreal, Cruz Alejandro Zamora, Francisca Adame, Alejandro Alvarado, Elizabeth Alvarado, Manuel Benavidez, Maria Galardo, Jose Gonzales, and Agustina Iglesias "are and represent individuals whose homes were damaged by Hurricane Dolly" and "seek a preliminary injunction to compel Defendant Federal Emergency Management Agency[("FEMA")] ... to: (1) publicly disclose the standards that it uses to decide applications for housing repair assistance; and (2) decide these applications in an equitable and impartial manner, without using hidden internal rules that effectively *prevent* low-income families from accessing home repair assistance." Dkt. No. 2, at 1 (emphasis in original). Plaintiffs contend that "Congress not only requires FEMA to publish ascertainable standards, it requires FEMA to do so in a manner that does not discriminate based on 'economic status.'" Dkt. No. 2, at 2 (citing 42 U.S.C. § 5151(a)). Plaintiffs reason that Defendant FEMA's unpublished and vague rules concerning housing repair assistance "*institutionalizes* economic discrimination." *Id.* (emphasis in original).

Hurricane Dolly struck the Texas coast on July 23, 2008 and the President of the United States declared the hurricane a major disaster and made assistance available to those affected in Cameron, Hidalgo, and Willacy Counties. Dkt. No. 2, at 3; Dkt. No. 16, at 12-13. Plaintiffs applied to Defendant FEMA for housing repair assistance for damage from Hurricane Dolly; however, FEMA denied their applications. Dkt. No. 2, at 3-8. FEMA denied housing repair assistance to "some ten thousand families in all." *Id.* at 2. FEMA explained that it denied a large number

applications because "[a] lot of the homes built were buil[t] from second hand materials. So the damage was, in most cases, caused from the faulty building of the house, and not the storm." *Id.* at 5 (quoting Dkt. No. 2, Ex. 1 at 9).

Plaintiffs seek relief under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. *Id.* at 9. Plaintiffs state that the relief sought will "minimize ongoing, irreparable harm to their families in the form of health hazards, displacement, and destruction of their property." *Id.* Plaintiffs argue that FEMA has failed to comply with its non-discretionary duties pursuant to 42 U.S.C. §§ 5151(a), 5174(j) and 44 C.F.R. § 206.117(b)(2), (c) in issuing regulations establishing eligibility requirements and then applying those requirements fairly and equitably. *Id.* at 1, 2. In response, FEMA asserts that "the actions [P]laintiffs seek are committed to FEMA's discretion." Dkt. No. 16, at 15, 20. FEMA moves for dismissal pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure as it alleges that Congress has not waived FEMA's sovereign immunity from suit. Dkt. No. 17.

II. Rule 12(b)(1) Dismissal

Rule 12(b)(1) allows a court to dismiss a lawsuit where the pleader proves that the court "lacks jurisdiction over the subject matter." FED. R. CIV. P. 12(b)(1). Essentially, Plaintiffs bear the burden of establishing that this Court has subject matter jurisdiction over the various claims they raised. *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001). "Ultimately, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of her claim that would entitle plaintiff to relief." *Id.* (citing *Home Builders Ass'n of Miss., Inc.*

v. City of Madison, Miss., 143 F.3d 1006, 1010 (5th Cir. 1998)). "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc.*, 143 F.3d at 1010 (quoting *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996)).

III. Sovereign Immunity

FEMA moves for dismissal under Rule 12(b)(1) of the Federal Rules of Civil Procedure because FEMA claims it has sovereign immunity from suit. Dkt. No. 17. The United States government and its administrative agencies are immune from suit absent explicit and unequivocal consent from Congress. *St. Tammany Parish v. FEMA*, 556 F.3d 307, 316 (5th Cir. 2009). The plaintiff bears the burden of demonstrating that Congress unequivocally waived sovereign immunity by raising claims that are "facially outside of the discretionary function exception." *Id.* at 315.

FEMA contends that it is immune from suit on all of Plaintiffs' claims. Dkt. No. 16, at 7, 17-26. FEMA states that neither the Stafford Act nor the APA waive sovereign immunity in this case. *Id.* at 18-26. Plaintiffs argue that Congress waived sovereign immunity in this matter considering the Stafford Act, 42 U.S.C. § 5148; the APA, 5 U.S.C. § 701(a)(2); and *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004). Dkt. No. 18, at 13.

While the APA waives sovereign immunity in limited circumstances, it bars judicial review of administrative action "committed to agency discretion by law." 5 U.S.C.

§ 701(a)(1), (2).

> The APA is a broadly applicable statute that "undoubtedly evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials." Section 702 of the APA authorizes suits against the United States through a limited waiver of sovereign immunity for "relief other than money damages" related to an agency's regulatory action. . . . However, the waiver does not apply "to the extent that - (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."

St. Tammany Parish, 556 F.3d at 317-18 (internal citations omitted). The Stafford Act contains a discretionary function exception which bars liability for and judicial review of discretionary actions brought under the APA. *Id.* at 318. The Stafford Act states that "[t]he Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this chapter." 42 U.S.C. § 5164.

The Fifth Circuit used the *Berkovitz* test to apply the discretionary function exception of the Stafford Act. *St. Tammany Parish*, 556 F.3d at 323. The Supreme Court in *Berkovitz v. U.S.* outlined a two-step test to determine whether an agency action falls within the discretionary

function exception. 486 U.S. 531 (1988). First, the court must determine that "the action is a matter of choice for the acting employee." *Id.* at 536 (explaining that discretion requires "an element of judgment or choice" and therefore the exception cannot apply where action is prescribed). Second, if the action involved judgment, the court must assess whether the act is "of the kind that the discretionary function exception was designed to shield." *Id.* Essentially, this element is satisfied where the judgment governing the act is grounded in "social, economic, and political policy." *Id.* at 537 ("The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy."). "[I]f a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations." *St. Tammany Parish*, 556 F.3d at 324 (quoting *U.S. v. Gaubert*, 499 U.S. 315, 324 (1991)).

The Fifth Circuit in *St. Tammany Parish v. FEMA* held that the regulations concerning financial assistance for removal of debris in disaster areas fell within the discretionary function exception. *St. Tammany Parish*, 556 F.3d at 324-26. The Court looked to the regulations and reasoned that as they were cast in discretionary terms, using "may" and "is authorized," FEMA had discretion to grant or deny assistance for debris removal assistance. *Id.* at 324-25. Moreover, the Circuit Court held "that funding decisions related to the extent of debris removal that is necessary to protect improved property, public health, and safety are exactly the type of public policy considerations that [the discretionary function exception

of the Stafford Act] shields from judicial scrutiny." *Id.* at 325. The Court went further and broadly stated that "[e]ligibility determinations, the distribution of limited funds, and other decisions regarding the funding of eligible projects are inherently discretionary and the exact types of policy decisions that are best left to the agencies without court interference." *Id.*

Plaintiffs argue that federal statutes require that FEMA issue regulations that include standards that outline eligibility for assistance and ensure that assistance is provided equitably and impartially. Dkt. No. 2, at 11. Three sections address the issuance of rules and regulations to assist the relief operations of the President. Section 5151, Nondiscrimination in disaster assistance, provides:

> (a) *Regulations* for equitable and impartial relief operations
>
> The President *shall* issue, and may alter and amend, *such regulations as may be necessary* for the guidance of personnel carrying out Federal assistance functions at the site of a major disaster or emergency. Such regulations *shall* include provisions for insuring that the distribution of supplies, the processing of applications, and other relief and assistance activities *shall* be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, disability, English proficiency, or economic status.

42 U.S.C. § 5151 (emphasis added). Section 5174, Federal assistance to individuals and households, provides:

(a) In general

(1) Provision of assistance

In accordance with this section, the President, in consultation with the Governor of a State, *may* provide financial assistance, and if necessary, direct services, to individuals and households in the State who, as a direct result of a major disaster, have necessary expenses and serious needs in cases in which the individuals and households are unable to meet such expenses or needs through other means.

. . .

(c) Types of housing assistance

. . .

(2) Repairs

(A) In general

The President *may* provide financial assistance for -- (i) the repair of owner-occupied private residences, utilities, and residential infrastructure (such as a private access route) damaged by a major disaster to a safe and sanitary living or functioning condition; and (ii) eligible hazard mitigation measures that reduce the likelihood of future damage to such residences, utilities, or infrastructure.

. . .

(j) *Rules and Regulations*

The President *shall prescribe rules and*

> *regulations* to carry out this section, *including criteria, standards, and procedures for determining eligibility* for assistance.

42 U.S.C. § 5174 (emphasis added). FEMA also points to § 5164, Rules and regulations, which provides that:

> The President *may prescribe such rules and regulations as may be necessary and proper* to carry out the provisions of this chapter, and *may exercise,* either directly or through such Federal agency as the President may designate, any power or authority conferred to the President by this chapter.

42 U.S.C. § 5164 (emphasis added).

When interpreting statutes, courts must look to the plain meaning of the statute and interpret it to give meaning to every word, clause, and sentence. *U.S. v. Menasche*, 348 U.S. 528, 538-39 (1955). Generally, "may" conveys discretion and "shall" mandates action. *McMullen v. U.S.*, 50 Fed. Cl. 718, 725 (Fed. Cl. 2001); *U.S. v. Myers*, 106 F.3d 936, 941 (10th Cir. 1997) ("[T]he word 'shall' in a statute 'generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive.'") (quoting *Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994)). However, when "shall" is modified by a discretionary phrase such as "as may be necessary" or "as appropriate" an agency has some discretion when complying with the mandate. *See Consumer Fed. of Am. & Pub. Citizen v. U.S. Dep't of Health & Human Servs.*, 83 F.3d 1497, 1503

(D.C. Cir. 1996) (indicating that where Congress in mandating administrative action modifies the word "shall" with the phrase "as appropriate" an agency has discretion to evaluate the circumstances and determine when and how to act).

In two of the three sections, Congress affords the President and thus FEMA some degree of discretion to choose to issue regulations "as may be necessary" and "proper." 42 U.S.C. §§ 5151(a) ("The President shall issue . . . such regulations as may be necessary."), 5164 ("The President may prescribe such rules and regulations as may be necessary and proper."). At most it seems that § 5151(a) requires that where the President issues regulations, those regulations shall be made to ensure that personnel carrying out the federal assistance functions shall process applications and grant relief in an equitable and impartial manner that does not discriminate against economic status. However, in § 5174, which concerns "Federal assistance to individuals and households," subsection (j) mandates the issuance of regulations that articulate the "criteria, standards, and procedures for determining eligibility for assistance." 42 U.S.C. § 5174(j). Clearly the mandate to issue rules and regulations found in § 5174(j), which unlike the other provisions, does not contain discretionary phrasing and therefore does not fall within the discretionary function exception of the Stafford Act.

FEMA has issued regulations concerning the issues addressed in the federal statutes Plaintiffs mention. There are regulations prohibiting unlawful discrimination, explaining eligibility factors, and defining terms. 44 C.F.R. §§ 206.11(b) (prohibiting unlawful discrimination), 206.113 (outlining eligibility factors), 206.111 (defining terms used in the section concerning eligibility factors). The issue that seemingly

remains is whether Congress afforded the President and by extension FEMA discretion in drafting the regulations which articulate the "criteria, standards, and procedures for determining eligibility for assistance." *Id.*

FEMA seems to concede that § 5151(a) requires that FEMA issue regulations; however, it contends that the regulations it has already issued satisfy this mandate to grant assistance equitably and impartially. Dkt. No. 16, at 25 (citing 44 C.F.R. § 206 11(b) ("Nondiscrimination in disaster assistance. . . . All personnel carrying out Federal major disaster or emergency assistance functions . . . shall perform their work in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status.")). However, Plaintiffs contend that the regulations issued are insufficient as they are "parroting regulations" that "merely paraphrase that statutory language" and fail to address the gaps left in the statutory text. Dkt. No. 2, at 13-14. Plaintiffs state that "FEMA leaves critical questions completely unaddressed in *any* published policy statement, including what magnitude, severity, and immediacy of health risk qualifies a repair for 'safety' purposes." Dkt. No. 2, at 14 (emphasis in original). FEMA contends that the regulations as well its guides and memoranda for applicants ensures assistance is granted equitably and fairly, articulates eligibility requirements, and explains assistance is not guaranteed. Dkt. No. 16, at 13.

FEMA issued regulations concerning eligibility for assistance and defining terms used when determining eligibility. Regulation 44 C.F.R. § 206.113, Eligibility factors, provides

> (a) Conditions of eligibility. In general, FEMA may provide assistance to individuals and households who qualify for such assistance under section 408 of the Stafford Act and this subpart. FEMA may only provide assistance:
>
> (1) When the individual or household has incurred a disaster-related necessary expense or *serious need* in the state in which the disaster has been declared. . . .
>
> . . .
>
> (b) Conditions of ineligibility. We *may not* provide assistance under this subpart:
>
> . . .
>
> (5) For housing assistance, for improvements or additions to the pre-disaster condition of property, except those required to comply with local and State ordinances or eligible mitigation measures.

44 C.F.R. § 206.113 (emphasis added). Regulation 44 C.F.R. § 206.117 provides

> (a) Purpose. FEMA may provide financial or direct assistance under this section to respond to the disaster-related housing needs of individuals and households.
>
> (b) Types of housing assistance --
>
> . . .
>
> (2) Repairs

> (i) FEMA may provide financial assistance for the repairs of uninsured disaster-related damages to an owner's primary residence. The funds are to help return owner-occupied primary residences to a *safe and sanitary living or functioning condition*. . . .
>
> (ii) The type of repair FEMA authorizes may vary depending upon the nature of the disaster. . . .
>
> . . .
>
> (c) Eligible costs
>
> (1) Repairs to the primary residence or replacement of items must be disaster-related and must be of average quality, size, and capacity, taking into consideration the needs of the occupant. Repairs to the primary residence are limited to *restoration of the dwelling to a safe and sanitary living or functioning condition.*

44 C.F.R. § 206.117 (emphasis added). The regulations also include a section of definitions, which state that:

> Functional means an item or home capable of being used for its intended purpose.
>
> . . .
>
> Safe means secure from disaster-related hazards or threats to occupants. Sanitary means free of disaster-related health hazards.
>
> Serious need means the requirement of

> an item, or service, that is essential to an applicant's ability to prevent, mitigate, or overcome a disaster-related hardship, injury or adverse condition.

44 C.F.R. § 206.111.

"[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron U.S.A., Inc. v. Nat'l Resources Defense Council, Inc.*, 467 U.S. 836, 844 (1984).

> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Id. at 843-44 (internal citations omitted).

FEMA also outlines eligibility requirements in a Guide, "Help After a Disaster: Applicant's Guide to the Individuals & Households Program, FEMA 545 / July 2008," given to every applicant. Dkt. No. 16, at 12-13; Dkt. No. 16, Ex. 1 at 9-11 (requiring for eligibility that the applicant is "not able to live in [her] home now, [she] cannot get to [her] home due to the disaster, or [her] home requires

repairs because of damage from the disaster" or that the applicant has "necessary expenses or serious needs because of the disaster"). The Guide explains that FEMA "only covers repairs ... or items that are damaged as a direct result of the disaster." Dkt. No. 16, Ex. 1 at 10. The Guide also states that the notation "IID -- Ineligible -- Insufficient Damage" indicates that the inspector determined that the "disaster had not caused the applicant's home to be unsafe to live in." *Id.* at 25.

Essentially, Plaintiffs challenge the conformance of FEMA's regulations with the congressional mandates. While the Court agrees with Plaintiffs that Congress mandated that regulations be issued regarding eligibility standards and that therefore the act of issuing regulations does not fall within the discretionary function exception, Congress also granted FEMA discretion to determine the content and the specificity of the regulations. *Compare* 42 U.S.C. § 5174(j) (mandating the issuance of regulations generally without including specific requirements as to the quality or specificity of those requirements), *with* 42 U.S.C. §§ 5151(a) (permitting FEMA to issue regulations regarding discrimination "as may be necessary"), 5164 (permitting FEMA to issue regulations concerning relief assistance "as may be necessary and proper").

Applying the first step of the *Berkovitz* test, the Court determines that § 5151(a) and § 5164 grant FEMA discretion to issue regulations concerning discrimination and general relief provisions when FEMA determines that they are "necessary and proper" and essentially allow FEMA to determine the content of the regulations FEMA issues. *See Berkovitz*, 486 U.S. at 536. Considering the second step, the Court concludes that the regulations concerning

discrimination and relief clearly involve decisions based on "social, economic, and political policy." *See id.* at 536-37. Therefore, the Court holds that FEMA has sovereign immunity from suit to the extent Plaintiffs challenge whether FEMA has issued sufficient regulations under § 5151(a) and § 5164.

Section 5174(j) does not contain the same discretionary language Congress used in § 5151(a) and § 5164. Therefore, this Court reasons that unlike § 5151(a) and § 5164, Congress mandated in § 5174(j) that the President, and therefore FEMA, issue regulations stating the criteria and standards by which eligibility will be measured. Implicitly in that general mandate, Congress granted FEMA discretion to determine the content and specificity of the eligibility requirements. However, this Court agrees with Plaintiffs that the regulations concerning eligibility FEMA has issued duplicate and fail to supplement the federal statutes. *Gonzalez v. Oregon*, 546 U.S. 243, 257 (2006) (indicating that a regulation essentially copies a federal statute where it repeats, summarizes, or paraphrases statutory text and offers no further instruction). *See* 44 C.F.R. §§ 206.113 (outlining eligibility requirements as they were outlined by Congress, which requires for home assistance that the uninsured damage was caused by the disaster), 206.111 (providing a definition section using commonly used, general meanings for language used in the federal statutes and the regulations, *i.e.*, "[f]unctional means an item or home capable of being used for its intended purpose" and "[s]anitary means free of disaster-related health hazards").

The congressional mandate to issue regulations concerning eligibility standards necessitates that FEMA's regulations include further criteria and standards of eligibility beyond

those identified by federal law. *See* 42 U.S.C. § 5174(j) ("The President shall prescribe . . . standards . . . for determining eligibility for assistance."). For, to hold otherwise would strip § 5174(j) of all effect. *See Haas v. Peake*, 525 F.3d 1168, 1186 (Fed. Cir. 2008) (explaining that an administrative agency is not afforded *Chevron* deference for interpreting its own regulation that parrots the federal text because courts do not interpret the parroting regulation but rather interpret the language from the federal statute). Congress, in requiring that the President issue regulations outlining eligibility, indicates that the federal statutory text insufficiently outlines eligibility and therefore it is necessary that FEMA issue regulations providing detailed criteria and standards. Thus, to the extent Plaintiffs challenge FEMA's failure to comply with this congressional mandate, FEMA may not use sovereign immunity to shield itself from suit.

[IV.] Preliminary Injunction

A court has considerable discretion to grant preliminary injunction as an extraordinary and drastic remedy where the movant clearly persuades the Court that it is appropriate. Wright, et al., 11A FEDERAL PRACTICE & PROCEDURE § 2948 (West). The movant must satisfy a conjunctive four-part test: "(1) a substantial likelihood of success on the merits; (2) a substantial threat that plaintiffs will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury outweighs any damage that the injunction might cause the defendant; and (4) that the injunction will not disserve the public interest." *Ridgley v. FEMA*, 512 F.3d 727, 734 (5th Cir. 2008).

Plaintiffs assert that they are entitled to a preliminary injunction as they are likely to succeed on the merits

of their claim under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, et seq.; they will suffer irreparable harm without the relief; the benefit of the relief outweighs the burden; and the injunction is in the public interest. Dkt. No. 2, at 8-22. Aside from arguing that sovereign immunity bars suit, FEMA also asserts that Plaintiffs have not demonstrated that they would suffer irreparable injury if this Court failed to grant a preliminary injunction and if this Court granted relief, FEMA and the public interest would be harmed as resources would be diverted from relief efforts. Dkt. No. 16, at 26-28.

In their Complaint, Plaintiffs seek injunctive relief "to minimize ongoing irreparable harm to their families in the form of health hazards, displacement, and destruction of their property." Dkt. No. 1, at 2. In the Prayer for relief, Plaintiffs request that this Court order that FEMA publish ascertainable standards for determining eligibility for housing repair assistance, reconsider those applications previously denied, and provide applicants timely and adequate notice of its actions concerning applications. *Id.* at 29. Plaintiffs contend that as FEMA's policy of "deferred maintenance" is vague and unascertainable it does not comply with the congressional mandate. Dkt. No. 2, at 11. Generally, an administrative agency must publish ascertainable standards by which conformance and eligibility may be measured. *See G.E. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (explaining that administrative agencies are required to provide notice of the ascertainable standards used to evaluate compliance with regulations). "'[W]hile there must be definiteness and ascertainable standards so that men of common intelligence can apprehend the meaning of the ordinance, perfect precision is neither

possible nor constitutionally required.'" *Am. Trucking Ass'n, Inc. v. Larson*, 683 F.2d 787, 801 (3d Cir. 1982) (holding that the federal statute and accompanying regulations did not lack an ascertainable standard) (quoting *Bykofsky v. Boro. of Middletown*, 401 F. Supp. 1242, 1253 (M.D. Pa. 1975)).

As discussed above, FEMA has failed to comply with the congressional mandate that it issue regulations outlining the criteria and standards for eligibility. Therefore, this Court finds that Plaintiffs have demonstrative a substantial likelihood of success on the merits. However, the Court's holding is not intended to challenge the quality of FEMA's deferred maintenance policy but merely to reiterate the congressional requirement that FEMA issue ascertainable eligibility standards and criteria. FEMA's deferred maintenance policy uses a standard derived from federal law, which requires that to be eligible for assistance the damage incurred must have been caused by the disaster and not the poor construction or poor maintenance of the home. *See* 42 U.S.C. §§ 5174(a)(1) (requiring that the necessary expense of serious need be a "*direct result*" of a major disaster), (b)(1) (requiring that for housing assistance individuals or households have a "*disaster-related*" need); 44 C.F.R. §§ 206.113(a)(1) (limiting assistance where there is a "*disaster-related*" need), 206.117(a) (same), *206.177(b)(2)(i)* (*returning* residences to safe, sanitary, and functioning conditions), 206.177(c)(1) (same).

Plaintiffs in this case allege that they will continue to suffer irreparable injuries as a result of not receiving relief assistance from FEMA. However, household assistance is not guaranteed to Plaintiffs even if FEMA more clearly outlines its standards and criteria for eligibility. Case

law concerning the redressability issue of standing to bring suit addresses this issue. Basically, "Plaintiffs need not demonstrate that there is a 'guarantee' that their injuries will be redressed by a favorable decision. In fact, . . . [P]laintiffs 'must show only that a favorable decision is *likely* to redress [their injuries], not that a favorable decision *will inevitably* redress [their injuries]." *Graham v. FEMA*, 149 F.3d 997, 1003 (9th Cir. 1998) (concerning standing requirements) (emphasis in original) (quoting *Beno v. Shalala*, 30 F.3d 1057, 1065 (9th Cir. 1994)). Similarly, where the process of awarding relief is challenged and not only the denial of relief, the applicants suffer injuries that may be alleviated by correcting the process. See *Ridgely v. FEMA*, No. 07-2146, slip op., 2007 WL 1728724, at *4 (E.D. La. June 13, 2007) (unpublished), *reversed on other grounds*.

As evidence of the harm suffered and the irreparable injuries that will continue, Plaintiffs provide multiple affidavits that allege risk of physical injury, displacement, and unrecoverable costs. Plaintiff Francisca Adame alleges that Hurricane Dolly damaged her roof and parts of her ceiling are now rotting; however, FEMA denied her assistance because damage to her home was not caused by the hurricane but the result of poor maintenance prior to the hurricane. Dkt. No. 2, Ex. 1 at 21, 46. Plaintiff Manuel Benavides asserts that his roof was damaged by Hurricane Dolly and that FEMA denied him benefits because it alleged that the damage was caused by deferred maintenance and not the hurricane. Dkt. No. 2, Ex. 1 at 24, 44. Plaintiff Maria Gallardo states that Hurricane Dolly damaged her roof causing her ceilings, walls, and carpet to rot which rendered her home unsafe to live in and caused her daughter

and grandchildren to move out because of mold and mildew exposure; however, FEMA denied her repair assistance because the damage was insufficient. Dkt. No. 2, Ex. 1 at 26. Plaintiff Jose Gonzalez, a quadriplegic, alleges that his home was structurally damaged by Hurricane Dolly, but FEMA refused to award repair assistance because the damage was caused by deferred maintenance not the hurricane. Dkt. No. 2, Ex. 1 at 29. Plaintiff Veronica Jimenez contends that FEMA has denied her assistance for extensive damage she asserts was caused by Hurricane Dolly because FEMA considers the damage to be insufficient. Dkt. No. 2, Ex. 1 at 31. Plaintiff Ernesto Lopez states that Hurricane Dolly rendered his home unlivable and caused the family to develop respir[illegible] roblems; however, FEMA denied him assistance because the damage was insufficient to quality for assistance. Dkt. No. 2, Ex. 1 at 33. FEMA denied Plaintiff Francisca Perez assistance for structural and plumbing damage to her home because the damage was insufficient although she asserts that waste overflows into the hold and mold and mildew have caused her asthmatic daughter to go to the hospital. Dkt. No. 2, Ex. 1 at 35-36. FEMA also denied Plaintiff Cruz Alejandro Zamora assistance for damage to his roof, walls, and foundation he alleged was caused by Hurricane Dolly. Dkt. No. 2, Ex. 1 at 38-39.

Given the injuries alleged by Plaintiffs and their challenge of the eligibility regulations, the Court concludes that they have met their burden as to the second element for a preliminary injunction. The Court finds that if FEMA were to outline more specific criteria and standards for eligibility, decisions made by FEMA implementing eligibility requirements could increase the relief awards granted

to some or many of the Plaintiffs, which would alleviate their injuries.

Concerning the remaining elements for a preliminary injunction, FEMA asserts that if this Court were to order it to draft new regulations that would result "a multi-step federal rule-making process that ordinarily requires a significant amount of time." Dkt. No. 16, at 26. FEMA also states that an order requiring that it issue regulations would undermine its ability to use its discretion in allocating resources. *Id.* at 28 ("FEMA must be free, and remain free, to administer its resources without judicial interference."). This Court finds that reasoning unpersuasive. This Court shall not find that requiring FEMA to comply with its congressional mandate would disserve the public interest or that the harm to FEMA outweighs the benefit to those injured. Plaintiffs have met their burden as to the last two elements as the burden of issuing the mandated regulations does not outweigh the benefit and it is in the public interest that FEMA issue ascertainable standards by which eligibility is determined.

[V.] Conclusion

WHEREFORE, the Court GRANTS Plaintiffs' Motion for a Preliminary Injunction, Dkt. No. 2, and DENIES Defendant's Motion to Dismiss, Dkt. No. 17. FEMA shall issue Rules and Regulations that outline definite and ascertainable criteria, standards, and procedures for determining eligibility for relief assistance beyond which is identified by federal law in compliance with the congressional mandate found in 42 U.S.C. § 5174(j).

DONE at Brownsville, Texas, on May 13, 2009.

/s/

Hilda G. Tagle

United States District Judge

APPENDIX D

[42 U.S.C. § 5174 (2006)]

§ 5174. Federal assistance to individuals and households

(a) In general.

(1) Provision of assistance. In accordance with this section, the President, in consultation with the Governor of a State, may provide financial assistance, and, if necessary, direct services, to individuals and households in the State who, as a direct result of a major disaster, have necessary expenses and serious needs in cases in which the individuals and households are unable to meet such expenses or needs through other means.

(2) Relationship to other assistance. Under paragraph (1), an individual or household shall not be denied assistance under paragraph (1), (3), or (4) of subsection (c) solely on the basis that the individual or household has not applied for or received any loan or other financial assistance from the Small Business Administration or any other Federal agency.

(b) Housing assistance.

(1) Eligibility. The President may provide financial or other assistance under this section to individuals and households to respond to the disaster-related housing needs of individuals and households who are displaced from their predisaster primary residences or whose predisaster primary residences are rendered uninhabitable, or with respect to individuals with disabilities, rendered inaccessible or uninhabitable, as a result of damage caused

by a major disaster.

(2) Determination of appropriate types of assistance.

(A) In general. The President shall determine appropriate types of housing assistance to be provided under this section to individuals and households described in subsection (a)(1) based on considerations of cost effectiveness, convenience to the individuals and households, and such other factors as the President may consider appropriate.

(B) Multiple types of assistance. One or more types of housing assistance may be made available under this section, based on the suitability and availability of the types of assistance, to meet the needs of individuals and households in the particular disaster situation.

(c) Types of housing assistance.

(1) Temporary housing.

(A) Financial assistance.

(i) In general. The President may provide financial assistance to individuals or households to rent alternate housing accommodations, existing rental units, manufactured housing, recreational vehicles, or other readily fabricated dwellings. Such assistance may include the payment of the cost of utilities, excluding telephone service.

(ii) Amount. The amount of assistance under clause (i) shall be based on the fair market rent for the accommodation provided plus the cost of any transportation, utility hookups, security deposits,

or unit installation not provided directly by the President.

(B) Direct assistance.

(i) In general. The President may provide temporary housing units, acquired by purchase or lease, directly to individuals or households who, because of a lack of available housing resources, would be unable to make use of the assistance provided under subparagraph (A).

(ii) Period of assistance. The President may not provide direct assistance under clause (i) with respect to a major disaster after the end of the 18-month period beginning on the date of the declaration of the major disaster by the President, except that the President may extend that period if the President determines that due to extraordinary circumstances an extension would be in the public interest.

(iii) Collection of rental charges. After the end of the 18-month period referred to in clause (ii), the President may charge fair market rent for each temporary housing unit provided.

(2) Repairs.

(A) In general. The President may provide financial assistance for—

(i) the repair of owner-occupied private residences, utilities, and residential infrastructure (such as a private access route) damaged by a major disaster to a safe and sanitary living or functioning condition; and

(ii) eligible hazard mitigation measures that reduce the likelihood of future damage to such residences, utilities, or infrastructure.

(B) Relationship to other assistance. A recipient of assistance provided under this paragraph shall not be required to show that the assistance can be met through other means, except insurance proceeds.

(3) Replacement.

(A) In general. The President may provide financial assistance for the replacement of owner-occupied private residences damaged by a major disaster.

(B) Applicability of flood insurance requirement. With respect to assistance provided under this paragraph, the President may not waive any provision of Federal law requiring the purchase of flood insurance as a condition of the receipt of Federal disaster assistance.

(4) Permanent housing construction. The President may provide financial assistance or direct assistance to individuals or households to construct permanent or semi-permanent housing in insular areas outside the continental United States and in other locations in cases in which—

(A) no alternative housing resources are available; and

(B) the types of temporary housing assistance described in paragraph (1) are unavailable, infeasible, or not cost-effective.

(d) Terms and conditions relating to housing assistance.

(1) Sites.

(A) In general. Any readily fabricated dwelling provided under this section shall, whenever practicable, be located on a site that--

(i) is complete with utilities;

(ii) meets the physical accessibility requirements for individuals with disabilities; and

(iii) is provided by the State or local government, by the owner of the site, or by the occupant who was displaced by the major disaster.

(B) Sites provided by the President. A readily fabricated dwelling may be located on a site provided by the President if the President determines that such a site would be more economical or accessible.

(2) Disposal of units.

(A) Sale to occupants.

(i) In general. Notwithstanding any other provision of law, a temporary housing unit purchased under this section by the President for the purpose of housing disaster victims may be sold directly to the individual or household who is occupying the unit if the individual or household lacks permanent housing.

(ii) Sale price. A sale of a temporary housing unit under clause (i) shall be at a price that is fair and equitable.

(iii) Deposit of proceeds. Notwithstanding any other provision of law, the proceeds of a sale under clause (i) shall be deposited in the appropriate

Disaster Relief Fund account.

(iv) Hazard and flood insurance. A sale of a temporary housing unit under clause (i) shall be made on the condition that the individual or household purchasing the housing unit agrees to obtain and maintain hazard and flood insurance on the housing unit.

(v) Use of GSA services. The President may use the services of the General Services Administration to accomplish a sale under clause (i).

(B) Other methods of disposal. If not disposed of under subparagraph (A), a temporary housing unit purchased under this section by the President for the purpose of housing disaster victims--

(i) may be sold to any person; or

(ii) may be sold, transferred, donated, or otherwise made available directly to a State or other governmental entity or to a voluntary organization for the sole purpose of providing temporary housing to disaster victims in major disasters and emergencies if, as a condition of the sale, transfer, or donation, the State, other governmental agency, or voluntary organization agrees--

(I) to comply with the nondiscrimination provisions of section 308 [42 USCS § 5151]; and

(II) to obtain and maintain hazard and flood insurance on the housing unit.

(e) Financial assistance to address other needs.

(1) Medical, dental, and funeral expenses. The

President, in consultation with the Governor of a State, may provide financial assistance under this section to an individual or household in the State who is adversely affected by a major disaster to meet disaster-related medical, dental, and funeral expenses.

(2) Personal property, transportation, and other expenses. The President, in consultation with the Governor of a State, may provide financial assistance under this section to an individual or household described in paragraph (1) to address personal property, transportation, and other necessary expenses or serious needs resulting from the major disaster.

(f) State role.

(1) Financial assistance to address other needs.

(A) Grant to State. Subject to subsection (g), a Governor may request a grant from the President to provide financial assistance to individuals and households in the State under subsection (e).

(B) Administrative costs. A State that receives a grant under subparagraph (A) may expend not more than 5 percent of the amount of the grant for the administrative costs of providing financial assistance to individuals and households in the State under subsection (e).

(2) Access to records. In providing assistance to individuals and households under this section, the President shall provide for the substantial and ongoing involvement of the States in which the individuals and households are located, including by providing to the States access to the electronic records of individuals and households receiving assistance under this section in

order for the States to make available any additional State and local assistance to the individuals and households.

(g) Cost sharing.

(1) Federal share. Except as provided in paragraph (2), the Federal share of the costs eligible to be paid using assistance provided under this section shall be 100 percent.

(2) Financial assistance to address other needs. In the case of financial assistance provided under subsection (e)—

(A) the Federal share shall be 75 percent; and

(B) the non-Federal share shall be paid from funds made available by the State.

(h) Maximum amount of assistance.

(1) In general. No individual or household shall receive financial assistance greater than $ 25,000 under this section with respect to a single major disaster.

(2) Adjustment of limit. The limit established under paragraph (1) shall be adjusted annually to reflect changes in the Consumer Price Index for All Urban Consumers published by the Department of Labor.

(i) Verification measures. In carrying out this section, the President shall develop a system, including an electronic database, that shall allow the President, or the designee of the President, to—

(1) verify the identity and address of recipients of assistance under this section to provide reasonable assurance that payments are made only to an individual or household that is eligible for such assistance;

(2) minimize the risk of making duplicative payments or payments for fraudulent claims under this section;

(3) collect any duplicate payment on a claim under this section, or reduce the amount of subsequent payments to offset the amount of any such duplicate payment;

(4) provide instructions to recipients of assistance under this section regarding the proper use of any such assistance, regardless of how such assistance is distributed; and

(5) conduct an expedited and simplified review and appeal process for an individual or household whose application for assistance under this section is denied.

(j) Rules and regulations. The President shall prescribe rules and regulations to carry out this section, including criteria, standards, and procedures for determining eligibility for assistance.

(May 22, 1974, P.L. 93-288, Title IV, § 408, as added Nov. 23, 1988, P.L. 100-707, Title I, § 106(d), 102 Stat. 4702; Oct. 30, 2000, P.L. 106-390, Title II, § 206(a), 114 Stat. 1566.)

(As amended Oct. 4, 2006, P.L. 109-295, Title VI, Subtitle E, §§ 685, 686, 689(c), 689d, Subtitle F, § 696(c), 120 Stat. 1447, 1449, 1452, 1461.)

APPENDIX E

[44 C.F.R. §§ 1.4 and 206.110-120 (2009)]

§ 1.4 Policy and procedures.

(a) In promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation, FEMA, to the extent permitted by law, shall adhere to the following requirements:

(1) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;

(2) Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society;

(3) Regulatory objectives shall be chosen to maximize the net benefits to society;

(4) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; and

(5) FEMA shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular entities affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.

(b) It is the policy of FEMA to provide for public participation in rulemaking regarding its programs and functions, including matters that relate to public property, loans, grants, or benefits, or contracts, even though these matters are not subject to a requirement for notice and

public comment rulemaking by law.

(c) FEMA will publish notices of proposed rulemaking in the Federal Register and will give interested persons an opportunity to participate in the rulemaking through submission of written data, views, and arguments with or without opportunity for oral presentation.

(d) In order to give the public, including small entities and consumer groups, an early and meaningful opportunity to participate in the development of rules, for a number of regulations the Administrator will employ additional methods of inviting public participation. These methods include, but are not limited to, publishing advance Notices of Proposed Rulemaking (ANPR), which can include a statement with respect to the impact of the proposed rule on small entities; holding open conferences; convening public forums or panels, sending notices of proposed regulations to publications likely to be read by those affected and soliciting comment from interested parties by such means as direct mail. An ANPR should be used to solicit public comment early in the rulemaking process for significant rules.

(e) It is the policy of FEMA that its notices of proposed rulemaking are to afford the public at least sixty days for submission of comments unless the Administrator makes an exception and sets forth the reasons for the exception in the preamble to the notice of proposed rulemaking. This period shall also include any period of review required by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1980.

(f) Unless required by statute or Executive Order, notice and public procedure may be omitted if the Administrator,

for good cause, determines in a particular case or class of cases that notice and public procedure is impractical, unnecessary or contrary to the public interest and sets forth the reason for the determination in the rulemaking document or, for a class of cases, in a published rule or statement of policy. In a particular case, the reasons for the determination will be stated in the rulemaking document. Notice and public procedure may also be omitted with respect to statements of policy, interpretative rules, rules governing FEMA's organization or its own internal practices or procedures, or if a statute expressly authorizes omission.

(g) A final substantive rule will be published not less than 30 days before its effective date unless it grants or recognizes an exemption or relieves a restriction or unless the rulemaking document states good cause for its taking effect less than 30 days after publication. Statements of policy and interpretative rules will usually be made effective on the date of publication.

(h) This part shall not apply to any regulation that responds to an emergency situation, provided that, any such regulation shall be reported to the Director, Office of Management and Budget, as soon as is practicable. FEMA shall publish in the Federal Register a statement of the reasons why it is impracticable for the agency to follow the procedures of Executive Order 12866 with respect to such a rule, and the agency shall prepare and transmit, if needed, as soon as is practicable a Regulatory Impact Analysis of any such major rule.

[46 FR 32584, June 24, 1981, as amended at 49 FR 38119, Sept. 27, 1984; 50 FR 40004, Oct. 1, 1985]

§ 206.110 Federal assistance to individuals and households.

(a) *Purpose.* This section implements the policy and procedures set forth in section 408 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5174, as amended by the Disaster Mitigation Act of 2000. This program provides financial assistance and, if necessary, direct assistance to eligible individuals and households who, as a direct result of a major disaster or emergency, have uninsured or under-insured, necessary expenses and serious needs and are unable to meet such expenses or needs through other means.

(b) *Maximum amount of assistance.* No individual or household will receive financial assistance greater than $25,000 under this subpart with respect to a single major disaster or emergency. FEMA will adjust the $25,000 limit annually to reflect changes in the Consumer Price Index (CPI) for All Urban Consumers that the Department of Labor publishes.

(c) *Multiple types of assistance.* One or more types of housing assistance may be made available under this section to meet the needs of individuals and households in the particular disaster situation. FEMA shall determine the appropriate types of housing assistance to be provided under this section based on considerations of cost effectiveness, convenience to the individuals and households and the suitability and availability of the types of assistance. An applicant is expected to accept the first offer of housing assistance; unwarranted refusal of assistance may result in the forfeiture of future housing assistance. Temporary housing and repair assistance shall be utilized to the fullest extent practicable before

other types of housing assistance.

(d) *Date of eligibility.* Eligibility for Federal assistance under this subpart will begin on the date of the incident that results in a presidential declaration that a major disaster or emergency exists, except that reasonable lodging expenses that are incurred in anticipation of and immediately preceding such event may be eligible for Federal assistance under this chapter.

(e) *Period of assistance.* FEMA may provide assistance under this subpart for a period not to exceed 18 months from the date of declaration. The Assistant Administrator for the Disaster Assistance Directorate may extend this period if he/she determines that due to extraordinary circumstances an extension would be in the public interest.

(f) *Assistance not counted as income.* Assistance under this subpart is not to be counted as income or a resource in the determination of eligibility for welfare, income assistance or income-tested benefit programs that the Federal Government funds.

(g) *Exemption from garnishment.* All assistance provided under this subpart is exempt from garnishment, seizure, encumbrance, levy, execution, pledge, attachment, release or waiver. Recipients of rights under this provision may not reassign or transfer the rights. These exemptions do not apply to FEMA recovering assistance fraudulently obtained or misapplied.

(h) *Duplication of benefits.* In accordance with the requirements of section 312 of the Stafford Act, 42 U.S.C. 5155, FEMA will not provide assistance under this subpart when any other source has already provided such assistance or when such assistance is available from any

other source. In the instance of insured applicants, we will provide assistance under this subpart only when:

(1) Payment of the applicable benefits are significantly delayed;

(2) Applicable benefits are exhausted;

(3) Applicable benefits are insufficient to cover the housing or other needs; or

(4) Housing is not available on the private market.

(i) *Cost sharing.*

(1) Except as provided in paragraph (i)(2) of this section, the Federal share of eligible costs paid under this subpart shall be 100 percent.

(2) Federal and State cost shares for "Other Needs" assistance under subsections 408 (e) and (f) of the Stafford Act will be as follows;

(i) The Federal share shall be 75 percent; and

(ii) The non-federal share shall be paid from funds made available by the State. If the State does not provide the non-Federal share to FEMA before FEMA begins to provide assistance to individuals and households under subsection 408(e) of the Stafford Act, FEMA will still process applications. The State will then be obliged to reimburse FEMA for the non-Federal cost share of such assistance on a monthly basis. If the State does not provide such reimbursement on a monthly basis, then FEMA will issue a Bill for Collection to the State on a monthly basis for the duration of the program. FEMA will charge interest, penalties, and administrative fees on delinquent Bills for Collection in accordance with the Debt Collection

Improvement Act. Cost shared funds, interest, penalties and fees owed to FEMA through delinquent Bills for Collections may be offset from other FEMA disaster assistance programs (i.e. Public Assistance) from which the State is receiving, or future grant awards from FEMA or other Federal Agencies. Debt Collection procedures will be followed as outlined in 44 CFR part 11.

(j) *Application of the Privacy Act.*

(1) All provisions of the Privacy Act of 1974, 5 U.S.C. 552a, apply to this subpart. FEMA may not disclose an applicant's record except:

(i) In response to a release signed by the applicant that specifies the purpose for the release, to whom the release is to be made, and that the applicant authorizes the release;

(ii) In accordance with one of the published routine uses in our system of records; or

(iii) As provided in paragraph (j)(2) of this section.

(2) Under section 408(f)(2) of the Stafford Act, 42 U.S.C. 5174(f)(2), FEMA must share applicant information with States in order for the States to make available any additional State and local disaster assistance to individuals and households.

(i) States receiving applicant information under this paragraph must protect such information in the same manner that the Privacy Act requires FEMA to protect it.

(ii) States receiving such applicant information shall not further disclose the information to other entities,

and shall not use it for purposes other than providing additional State or local disaster assistance to individuals and households.

(k) *Flood Disaster Protection Act requirement.*

(1) The Flood Disaster Protection Act of 1973, Public Law 93–234, as amended (42 U.S.C. 4106), imposes certain restrictions on federal financial assistance for acquisition and construction purposes. For the purpose of this paragraph, financial assistance for acquisition or construction purposes means assistance to an individual or household to buy, receive, build, repair or improve insurable portions of a home and/or to purchase or repair insurable contents. For a discussion of what elements of a home and contents are insurable, See 44 CFR part 61, Insurance Coverage and Rates.

(2) Individuals or households that are located in a special flood hazard area may not receive Federal Assistance for National Flood Insurance Program (NFIP)—insurable real and/or personal property, damaged by a flood, unless the community in which the property is located is participating in the NFIP (See 44 CFR part 59.1), or the exception in 42 U.S.C. 4105(d) applies. However, if the community in which the damaged property is located qualifies for and enters the NFIP during the six-month period following the declaration, the Governor's Authorized Representative may request a time extension for FEMA (See §206.112) to accept registrations and to process assistance applications in that community.

(3) Flood insurance purchase requirement:

(i) As a condition of the assistance and in order to receive any Federal assistance for future flood damage

to any insurable property, individuals and households named by FEMA as eligible recipients under section 408 of the Stafford Act who receive assistance, due to flood damages, for acquisition or construction purposes under this subpart must buy and maintain flood insurance, as required in 42 U.S.C. 4012a, for at least the assistance amount. This applies only to real and personal property that is in or will be in a designated Special Flood Hazard Area and that can be insured under the National Flood Insurance Program.

(A) If the applicant is a homeowner, flood insurance coverage must be maintained at the address of the flood-damaged property for as long as the address exists. The flood insurance requirement is reassigned to any subsequent owner of the flood-damaged address.

(B) If the applicant is a renter, flood insurance coverage must be maintained on the contents for as long as the renter resides at the flood-damaged rental unit. The restriction is lifted once the renter moves from the rental unit.

(C) When financial assistance is used to purchase a dwelling, flood insurance coverage must be maintained on the dwelling for as long as the dwelling exists and is located in a designated Special Flood Hazard Area. The flood insurance requirement is reassigned to any subsequent owner of the dwelling.

(ii) FEMA may not provide financial assistance for acquisition or construction purposes to individuals

or households who fail to buy and maintain flood insurance required under paragraph (k)(3)(i) of this section or required by the Small Business Administration.

(l) *Environmental requirements.* Assistance provided under this subpart must comply with the National Environmental Policy Act (NEPA) and other environmental laws and Executive Orders, consistent with 44 CFR part 10.

(m) *Historic preservation.* Assistance provided under this subpart generally does not have the potential to affect historic properties and thus is exempted from review in accordance with section 106 of the National Historic Preservation Act, with the exception of ground disturbing activities and construction related to §§206.117(b)(1)(ii) (Temporary housing), 206.117(b)(3) (Replacement housing), and 206.117(b)(4) (Permanent housing construction).

[67 FR 61452, Sept. 30, 2002; 67 FR 62896, Oct. 9, 2002]

§ 206.111 Definitions.

Adequate, alternate housing means housing that accommodates the needs of the occupants; is within the normal commuting patterns of the area or is within reasonable commuting distance of work, school, or agricultural activities that provide over 50 percent of the household income; and is within the financial ability of the occupant.

Alternative housing resources means any housing that is available or can quickly be made available in lieu of permanent housing construction and is cost-effective when compared to permanent construction costs. Some

examples are rental resources, mobile homes and travel trailers.

Applicant means an individual or household who has applied for assistance under this subpart.

Assistance from other means includes monetary or in-kind contributions from voluntary or charitable organizations, insurance, other governmental programs, or from any sources other than those of the applicant.

Dependent means someone who is normally claimed as such on the Federal tax return of another, according to the Internal Revenue Code. It may also mean the minor children of a couple not living together, where the children live in the affected residence with the parent or guardian who does not actually claim them on the tax return.

Displaced applicant means one whose primary residence is uninhabitable, inaccessible, made unavailable by the landlord (to meet their disaster housing need) or not functional as a direct result of the disaster and has no other housing available in the area, i.e., a secondary home or vacation home.

Effective date of assistance means the date that the applicant was determined eligible for assistance.

Eligible hazard mitigation measures are home improvements that an applicant can accomplish in order to reduce or prevent future disaster damages to essential components of the home.

Fair market rent means housing market-wide estimates of rents that provide opportunities to rent standard quality housing throughout the geographic area in which rental housing units are in competition. The fair market rent

rates applied are those identified by the Department of Housing and Urban Development as being adequate for existing rental housing in a particular area.

Financial ability means the applicant's capability to pay housing costs. If the household income has not changed subsequent to or as a result of the disaster then the determination is based upon the amount paid for housing before the disaster. If the household income is reduced as a result of the disaster then the applicant will be deemed capable of paying 30 percent of gross post disaster income for housing. When computing financial ability, extreme or unusual financial circumstances may be considered by the Regional Administrator.

Financial assistance means cash that may be provided to eligible individuals and households, usually in the form of a check or electronic funds transfer.

Functional means an item or home capable of being used for its intended purpose.

Household means all persons (adults and children) who lived in the pre-disaster residence who request assistance under this subpart, as well as any persons, such as infants, spouse, or part-time residents who were not present at the time of the disaster, but who are expected to return during the assistance period.

Housing costs means rent and mortgage payments, including principal, interest, real estate taxes, real property insurance, and utility costs.

Inaccessible means as a result of the incident, the applicant cannot reasonably be expected to gain entry to his or her pre-disaster residence due to the disruption, or destruction, of access routes or other impediments to

access, or restrictions placed on movement by a responsible official due to continued health, safety or security problems.

In-kind contributions mean something other than monetary assistance, such as goods, commodities or services.

Lodging expenses means expenses for reasonable short-term accommodations that individuals or households incur in the immediate aftermath of a disaster. Lodging expenses may include but are not limited to the cost of brief hotel stays.

Manufactured housing sites means those sites used for the placement of government or privately owned mobile homes, travel trailers, and other manufactured housing units, including:

(1) Commercial site, a site customarily leased for a fee, which is fully equipped to accommodate a housing unit;

(2) Private site, a site that the applicant provides or obtains at no cost to the Federal Government, complete with utilities; and

(3) Group site, a site provided by the State or local government that accommodates two or more units and is complete with utilities.

Necessary expense means the cost associated with acquiring an item or items, obtaining a service, or paying for any other activity that meets a serious need.

Occupant means a resident of a housing unit.

Owner-occupied means that the residence is occupied by:

(1) The legal owner;

(2) A person who does not hold formal title to the residence and pays no rent, but is responsible for the payment of taxes or maintenance of the residence; or

(3) A person who has lifetime occupancy rights with formal title vested in another.

Permanent housing plan means a realistic plan that, within a reasonable timeframe, puts the disaster victim back into permanent housing that is similar to the victim's pre-disaster housing situation. A reasonable timeframe includes sufficient time for securing funds, locating a permanent dwelling, and moving into the dwelling.

Primary residence means the dwelling where the applicant normally lives, during the major portion of the calendar year; or the dwelling that is required because of proximity to employment, including agricultural activities, that provide 50 percent of the household's income.

Reasonable commuting distance means a distance that does not place undue hardship on an applicant. It also takes into consideration the traveling time involved due to road conditions, e.g., mountainous regions or bridges out and the normal commuting patterns of the area.

Safe means secure from disaster-related hazards or threats to occupants.

Sanitary means free of disaster-related health hazards.

Serious need means the requirement for an item, or service, that is essential to an applicant's ability to prevent, mitigate, or overcome a disaster-related hardship, injury or adverse condition.

Significantly delayed means the process has taken more than 30 days.

Uninhabitable means the dwelling is not safe, sanitary or fit to occupy.

We, our, and us mean FEMA.

[67 FR 61452, Sept. 30, 2002; 67 FR 62896, Oct. 9, 2002]

§ 206.112 Registration period.

(a) *Initial period.* The standard FEMA registration period is 60 days following the date that the President declares an incident a major disaster or an emergency.

(b) *Extension of the registration period.* The regional administrator or his/her designee may extend the registration period when the State requests more time to collect registrations from the affected population. The Regional Administrator or his/her designee may also extend the standard registration period when necessary to establish the same registration deadline for contiguous counties or States.

(c) *Late registrations.* After the standard or extended registration period ends, FEMA will accept late registrations for an additional 60 days. We will process late registrations for those registrants who provide suitable documentation to support and justify the reason for the delay in their registration.

[67 FR 61452, Sept. 30, 2002; 67 FR 62896, Oct. 9, 2002]

§ 206.113 Eligibility factors.

(a) *Conditions of eligibility.* In general, FEMA may provide assistance to individuals and households who qualify for such assistance under section 408 of the Stafford Act and this subpart. FEMA may only provide assistance:

(1) When the individual or household has incurred a disaster-related necessary expense or serious need in the state in which the disaster has been declared, without regard to their residency in that state;

(2) In a situation where the applicant has insurance, when the individual or household files a claim with their insurance provider for all potentially applicable types of insurance coverage and the claim is denied;

(3) In a situation where the applicant has insurance, when the insured individual or household's insurance proceeds have been significantly delayed through no fault of his, her or their own, and the applicant has agreed to repay the assistance to FEMA or the State from insurance proceeds that he, she or they receive later;

(4) In a situation where the applicant has insurance, when the insured individual or household's insurance proceeds are less than the maximum amount of assistance FEMA can authorize and the proceeds are insufficient to cover the necessary expenses or serious needs;

(5) In a situation where the applicant has insurance, when housing is not available on the private market;

(6) In a situation where the applicant has insurance, when the insured individual or household has accepted all assistance from other sources for which he, she, or they are eligible, including insurance, when the insured

individual or household's insurance proceeds and all other assistance are less than the maximum amount of assistance FEMA can authorize and the proceeds are insufficient to cover the necessary expense or serious needs;

(7) When the applicant agrees to refund to FEMA or the State any portion of the assistance that the applicant receives or is eligible to receive as assistance from another source;

(8) With respect to housing assistance, if the primary residence has been destroyed, is uninhabitable, or is inaccessible; and

(9) With respect to housing assistance, if a renter's primary residence is no longer available as a result of the disaster.

(b) *Conditions of ineligibility.* We may not provide assistance under this subpart:

(1) For housing assistance, to individuals or households who are displaced from other than their pre-disaster primary residence;

(2) For housing assistance, to individuals or households who have adequate rent-free housing accommodations;

(3) For housing assistance, to individuals or households who own a secondary or vacation residence within reasonable commuting distance to the disaster area, or who own available rental property that meets their temporary housing needs;

(4) For housing assistance, to individuals or households who evacuated the residence in response to official warnings solely as a precautionary measure and who are able to return to the residence immediately after the

incident;

(5) For housing assistance, for improvements or additions to the pre-disaster condition of property, except those required to comply with local and State ordinances or eligible mitigation measures;

(6) To individuals or households who have adequate insurance coverage and where there is no indication that insurance proceeds will be significantly delayed, or who have refused assistance from insurance providers;

(7) To individuals or households whose damaged primary residence is located in a designated special flood hazard area, and in a community that is not participating in the National Flood Insurance Program, except that financial assistance may be provided to rent alternate housing and for medical, dental, funeral expenses and uninsurable items to such individuals or households. However, if the community in which the damaged property is located qualifies for and enters the NFIP during the six-month period following the declaration then the individual or household may be eligible;

(8) To individuals or households who did not fulfill the condition to purchase and maintain flood insurance as a requirement of receiving previous Federal disaster assistance;

(9) For business losses, including farm businesses and self-employment; or

(10) For any items not otherwise authorized by this section.

[67 FR 61452, Sept. 30, 2002; 67 FR 62896, Oct. 9, 2002]

§ 206.114 Criteria for continued assistance.

(a) FEMA expects all recipients of assistance under this subpart to obtain and occupy permanent housing at the earliest possible time. FEMA may provide continued housing assistance during the period of assistance, but not to exceed the maximum amount of assistance for the program, based on need, and generally only when adequate, alternate housing is not available or when the permanent housing plan has not been fulfilled through no fault of the applicant.

(b) Additional criteria for continued assistance.

(1) All applicants requesting continued rent assistance must establish a realistic permanent housing plan no later than the first certification for continued assistance. Applicants will be required to provided documentation showing that they are making efforts to obtain permanent housing.

(2) Applicants requesting continued rent assistance must submit rent receipts to show that they have exhausted the FEMA rent funds, and provide documentation identifying the continuing need.

(3) FEMA generally expects that pre-disaster renters will use their initial rental assistance to obtain permanent housing. However, we may certify them, during the period of assistance, for continued rent assistance when adequate, alternate housing is not available, or when they have not realized a permanent housing plan through no fault of their own.

(4) FEMA may certify pre-disaster owners for continued rent assistance, during the period of assistance, when adequate, alternate housing is not available, or when

they have not realized a permanent housing plan through no fault of their own.

(5) Individuals or households requesting additional repair assistance will be required to submit information and/or documentation identifying the continuing need.

(6) Individuals or households requesting additional assistance for personal property, transportation, medical, dental, funeral, moving and storage, or other necessary expenses and serious needs will be required to submit information and/or documentation identifying the continuing need.

[67 FR 61452, Sept. 30, 2002; 67 FR 62896, Oct. 9, 2002]

§ 206.115 Appeals.

(a) Under the provisions of section 423 of the Stafford Act, applicants for assistance under this subpart may appeal any determination of eligibility for assistance made under this subpart. Applicants must file their appeal within 60 days after the date that we notify the applicant of the award or denial of assistance. Applicants may appeal the following:

(1) Eligibility for assistance, including recoupment;

(2) Amount or type of assistance;

(3) Cancellation of an application;

(4) The rejection of a late application;

(5) The denial of continued assistance under §206.114, Criteria for continued assistance;

(6) FEMA's intent to collect rent from occupants of

a housing unit that FEMA provides;

(7) Termination of direct housing assistance;

(8) Denial of a request to purchase a FEMA-provided housing unit at the termination of eligibility;

(9) The sales price of a FEMA-provided housing unit they want to purchase; or

(10) Any other eligibility-related decision.

(b) Appeals must be in writing and explain the reason(s) for the appeal. The applicant or person who the applicant authorizes to act on his or her behalf must sign the appeal. If someone other than the applicant files the appeal, then the applicant must also submit a signed statement giving that person authority to represent him, her or them.

(c) Applicants must appeal to the Regional Administrator or his/her designee for decisions made under this subpart, unless FEMA has made a grant to the State to provide assistance to individuals and households under §206.120(a), State administration of other needs assistance; then the applicant must appeal to the State.

(d) An applicant may ask for a copy of information in his or her file by writing to FEMA or the State as appropriate. If someone other than the applicant is submitting the request, then the applicant must also submit a signed statement giving that person authority to represent him or her.

(e) The appropriate FEMA or State program official will notify the applicant in writing of the receipt of the appeal.

(f) The Regional Administrator or his/her designee or appropriate State official will review the original decision after receiving the appeal. FEMA or the State, as

appropriate, will give the appellant a written notice of the disposition of the appeal within 90 days of the receiving the appeal. The decision of the appellate authority is final.

[67 FR 61452, Sept. 30, 2002; 67 FR 62896, Oct. 9, 2002]

§ 206.116 Recovery of funds.

(a) The applicant must agree to repay to FEMA (when funds are provided by FEMA) and/or the State (when funds are provided by the State) from insurance proceeds or recoveries from any other source an amount equivalent to the value of the assistance provided. In no event must the amount repaid to FEMA and/or the State exceed the amount that the applicant recovers from insurance or any other source.

(b) An applicant must return funds to FEMA and/or the State (when funds are provided by the State) when FEMA and/or the State determines that the assistance was provided erroneously, that the applicant spent the funds inappropriately, or that the applicant obtained the assistance through fraudulent means.

[67 FR 61452, Sept. 30, 2002; 67 FR 62896, Oct. 9, 2002]

§ 206.117 Housing assistance.

(a) *Purpose.* FEMA may provide financial or direct assistance under this section to respond to the disaster-related housing needs of individuals and households.

(b) *Types of housing assistance* —

(1) *Temporary housing assistance* —

(i) *Financial assistance.* Eligible individuals and households may receive financial assistance to rent alternate housing resources, existing rental units, manufactured housing, recreational vehicles, or other readily fabricated dwellings. FEMA may also provide assistance for the reasonable cost of any transportation, utility hookups, or installation of a manufactured housing unit or recreational vehicle to be used for housing. This includes reimbursement for reasonable short-term lodging expenses that individuals or households incur in the immediate aftermath of a disaster.

(A) FEMA will include all members of a pre-disaster household in a single registration and will provide assistance for one temporary housing residence, unless the Regional Administrator or his/her designee determines that the size or nature of the household requires that we provide assistance for more than one residence.

(B) FEMA will base the rental assistance on the Department of Housing and Urban Development's current fair market rates for existing rental units. FEMA will further base the applicable rate on the household's bedroom requirement and the location of the rental unit.

(C) All utility costs and utility security deposits are the responsibility of the occupant except where the utility does not meter utility services separately and utility services are a part of the rental charge.

(D) The occupant is responsible for all housing

security deposits. In extraordinary circumstances, the Regional Administrator or his/her designee may authorize the payment of security deposits; however, the owner or occupant must reimburse the full amount of the security deposit to the Federal Government before or at the time that the temporary housing assistance ends.

(ii) *Direct assistance.*

(A) FEMA may provide direct assistance in the form of purchased or leased temporary housing units directly to individuals or households who lack available housing resources and would be unable to make use of the assistance provided under paragraph (b)(1)(i) of this section.

(B) FEMA will include all members of a pre-disaster household in a single application and will provide assistance for one temporary housing residence, unless the Regional Administrator or his/her designee determines that the size or nature of the household requires that we provide assistance for more than one residence.

(C) Any site upon which a FEMA-provided housing unit is placed must comply with applicable State and local codes and ordinances, as well as 44 CFR part 9, Floodplain Management and Protection of Wetlands, and 44 CFR part 10, Environmental Considerations, and all other applicable environmental laws and Executive Orders.

(D) All utility costs and utility security deposits are the responsibility of the occupant except where the utility does not meter utility services separately

and utility services are a part of the rental charge.

(E) FEMA-provided or funded housing units may be placed in the following locations:

(1) A commercial site that is complete with utilities; when the Regional Administrator or his/her designee determines that the upgrading of commercial sites, or installation of utilities on such sites, will provide more cost-effective, timely and suitable temporary housing than other types of resources, then Federal assistance may be authorized for such actions.

(2) A private site that an applicant provides, complete with utilities; when the Regional Administrator or his/her designee determines that the cost of installation or repairs of essential utilities on private sites will provide more cost effective, timely, and suitable temporary housing than other types of resources, then Federal assistance may be authorized for such actions.

(3) A group site that the State or local government provides that accommodates two or more units and is complete with utilities; when the Regional Administrator or his/her designee determines that the cost of developing a group site provided by the State or local government, to include installation or repairs of essential utilities on the sites, will provide more cost effective, timely, and suitable temporary housing than other types of

resources, then Federal assistance may be authorized for such actions.

(4) A group site provided by FEMA, if the Regional Administrator or his/her designee determines that such a site would be more economical or accessible than one that the State or local government provides.

(F) After the end of the 18-month period of assistance, FEMA may begin to charge up to the fair market rent rate for each temporary housing unit provided. We will base the rent charged on the number of bedrooms occupied and needed by the household. When establishing the amount of rent, FEMA will take into account the financial ability of the household.

(G) We may terminate direct assistance for reasons that include, but are not limited to, the following:

(1) The period of assistance expired under §206.110(e) and has not been extended;

(2) Adequate alternate housing is available to the occupant(s);

(3) The occupant(s) obtained housing assistance through either misrepresentation or fraud;

(4) The occupant(s) failed to comply with any term of the lease/rental agreement or other rules of the site where the unit is located.

(5) The occupant(s) does not provide evidence documenting that they are working towards a permanent housing plan.

(H) FEMA will provide a 15 day written notice

when initiating the termination of direct assistance that we provide under our lease agreements. This notice will specify the reasons for termination of assistance and occupancy, the date of termination, the procedure for appealing the determination, and the occupant's liability for such additional charges as the Regional Administrator or his/her designee deems appropriate after the termination date, including fair market rent for the unit.

(I) Duplication of benefits may occur when an applicant has additional living expense insurance benefits to cover the cost of renting alternate housing. In these instances, FEMA may provide a temporary housing unit if adequate alternate housing is not available, or if doing so is in the best interest of the household and the government. We will establish fair market rent, not to exceed insurance benefits available.

(2) *Repairs.*

(i) FEMA may provide financial assistance for the repairs of uninsured disaster-related damages to an owner's primary residence. The funds are to help return owner-occupied primary residences to a safe and sanitary living or functioning condition. Repairs may include utilities and residential infrastructure (such as private access routes, privately owned bridge, wells and/or septic systems) damaged by a major disaster.

(ii) The type of repair FEMA authorizes may vary depending upon the nature of the disaster. We may authorize repair of items where feasible or

replacement when necessary to insure the safety or health of the occupant and to make the residence functional.

(iii) FEMA may also provide assistance for eligible hazard mitigation measures that reduce the likelihood of future damage to damaged residences, utilities or infrastructure.

(iv) Eligible individuals or households may receive up to $5,000 under this paragraph, adjusted annually to reflect changes in the CPI, to repair damages to their primary residence without first having to show that the assistance can be met through other means, except insurance proceeds.

(v) The individual or household is responsible for obtaining all local permits or inspections that applicable State or local building codes may require.

(3) *Replacement.* FEMA may provide financial assistance under this paragraph to replace the primary residence of an owner-occupied dwelling if the dwelling was damaged by the disaster and there was at least $10,000 of damage (as adjusted annually to reflect changes in the CPI). The applicant may either replace the dwelling in its entirety for $10,000 (as adjusted annually to reflect changes in the CPI) or less, or may use the assistance toward the cost of acquiring a new permanent residence that is greater in cost than $10,000 (as adjusted annually to reflect changes in the CPI). All replacement assistance awards must be individually approved by the Assistant Administrator for the Disaster Assistance Directorate. The Assistant Administrator for the Disaster Assistance Directorate may approve replacement assistance for

applicants whose damages are less than $10,000 in extraordinary circumstances where replacement assistance is more appropriate than other forms of housing assistance.

(4) *Permanent housing construction.* FEMA may provide financial or direct assistance to applicants for the purpose of constructing permanent housing in insular areas outside the continental United States and in other remote locations when alternative housing resources are not available and the types of financial or direct temporary housing assistance described at paragraph (b)(1) of this section are unavailable, infeasible, or not cost-effective.

(c) *Eligible costs.*

(1) Repairs to the primary residence or replacement of items must be disaster-related and must be of average quality, size, and capacity, taking into consideration the needs of the occupant. Repairs to the primary residence are limited to restoration of the dwelling to a safe and sanitary living or functioning condition and may include:

(i) Repair or replacement of the structural components, including foundation, exterior walls, and roof;

(ii) Repair or replacement of the structure's windows and doors;

(iii) Repair or replacement of the structure's Heating, Ventilation and Air Conditioning System;

(iv) Repair or replacement of the structure's utilities, including electrical, plumbing, gas, water and sewage systems;

(v) Repair or replacement of the structure's interior, including floors, walls, ceilings, doors and cabinetry;

(vi) Repair to the structure's access and egress,

including privately owned access road and privately owned bridge;

(vii) Blocking, leveling, and anchoring of a mobile home, and reconnecting or resetting mobile home sewer, water, electrical and fuel lines and tanks; and

(viii) Items or services determined to be eligible hazard mitigation measures.

(2) Replacement assistance will be based on the verified disaster-related level of damage to the dwelling, or the statutory maximum, whichever is less.

(3) Permanent housing construction, in general, must be consistent with current minimal local building codes and standards where they exist, or minimal acceptable construction industry standards in the area, including reasonable hazard mitigation measures, and federal environmental laws and regulations Dwellings will be of average quality, size and capacity, taking into consideration the needs of the occupant.

[67 FR 61452, Sept. 30, 2002; 67 FR 62896, Oct. 9, 2002]

§ 206.118 Disposal of housing units.

(a) FEMA may sell housing units purchased under §206.117(b)(1)(ii), Temporary housing, direct assistance, as follows:

(1) *Sale to an applicant.*

(i) Sale to the individual or household occupying the unit, if the occupant lacks permanent housing, has a site that complies with local codes and ordinances and part 9 of this Title.

(ii) Adjustment to the sales price. FEMA may approve adjustments to the sales price when selling a housing unit to the occupant of a unit if the purchaser is unable to pay the fair market value of the home or unit and when doing so is in the best interest of the applicant and FEMA.

(iii) FEMA may sell a housing unit to the occupant only on the condition that the purchaser agrees to obtain and maintain hazard insurance, as well as flood insurance on the unit if it is or will be in a designated Special Flood Hazard Area.

(2) *Other methods of disposal*:

(i) FEMA may sell, transfer, donate, or otherwise make a unit available directly to a State or other governmental entity, or to a voluntary organization, for the sole purpose of providing temporary housing to disaster victims in major disasters and emergencies. As a condition of the sale, transfer, or donation, or other method of provision, the State, governmental entity, or voluntary organization must agree to:

(A) Comply with the nondiscrimination provisions of the Stafford Act, 42 U.S.C. 5151; and

(B) Obtain and maintain hazard insurance on the unit, as well as flood insurance if the housing unit is or will be in a designated Special Flood Hazard Area.

(ii) FEMA may also sell housing units at a fair market value to any other person.

(b) A unit will be sold "as is, where is," except for repairs FEMA deems necessary to protect health or safety, which are to be completed before the sale. There will be no implied

warranties. In addition, FEMA will inform the purchaser that he/she may have to bring the unit up to codes and standards that are applicable at the proposed site.

[67 FR 61452, Sept. 30, 2002; 67 FR 62896, Oct. 9, 2002]

§ 206.119 Financial assistance to address other needs.

(a) *Purpose.* FEMA and the State may provide financial assistance to individuals and households who have other disaster-related necessary expenses or serious needs. To qualify for assistance under this section, an applicant must also:

(1) Apply to the United States Small Business Administration's (SBA) Disaster Home Loan Program for all available assistance under that program; and

(2) Be declined for SBA Disaster Home Loan Program assistance; or

(3) Demonstrate that the SBA assistance received does not satisfy their total necessary expenses or serious needs arising out of the major disaster.

(b) *Types of assistance.*

(1) Medical, dental, and funeral expenses. FEMA may provide financial assistance for medical, dental and funeral items or services to meet the disaster-related necessary expenses and serious needs of individuals and households.

(2) Personal property, transportation, and other expenses.

(i) FEMA may provide financial assistance for personal property and transportation items or services to meet

the disaster-related necessary expenses and serious needs of individuals and households.

(ii) FEMA may provide financial assistance for other items or services that are not included in the specified categories for other assistance but which FEMA approves, in coordination with the State, as eligible to meet unique disaster-related necessary expenses and serious needs of individuals and households.

(c) *Eligible costs*—

(1) *Personal property.* Necessary expenses and serious needs for repair or replacement of personal property are generally limited to the following:

(i) Clothing;

(ii) Household items, furnishings or appliances;

(iii) Tools, specialized or protective clothing, and equipment required by an employer as a condition of employment;

(iv) Computers, uniforms, schoolbooks and supplies required for educational purposes; and

(v) Cleaning or sanitizing any eligible personal property item.

(2) *Transportation.* Necessary expenses or serious needs for transportation are generally limited to the following:

(i) Repairing or replacing vehicles; and

(ii) Financial assistance for public transportation and any other transportation related costs or services.

(3) *Medical expenses.* Medical expenses are generally

limited to the following:

(i) Medical costs;

(ii) Dental costs; and

(iii) Repair or replacement of medical equipment.

(4) *Funeral expenses.* Funeral expenses are generally limited to the following

(i) Funeral services;

(ii) Burial or cremation; and

(iii) Other related funeral expenses.

(5) *Moving and storage expenses.* Necessary expenses and serious needs related to moving and storing personal property to avoid additional disaster damage generally include storage of personal property while disaster-related repairs are being made to the primary residence, and return of the personal property to the individual or household's primary residence.

(6) *Other.* Other disaster-related expenses not addressed in this section may include:

(i) The purchase of a Group Flood Insurance Policy as described in paragraph (d) of this section.

(ii) Other miscellaneous items or services that FEMA, in consultation with the State, determines are necessary expenses and serious needs.

(d) *Group Flood Insurance purchase.* Individuals identified by FEMA as eligible for "Other Needs" assistance under section 408 of the Stafford Act as a result of flood damage caused by a Presidentially-declared major disaster and who reside in a special flood hazard area (SFHA) may

be included in a Group Flood Insurance Policy (GFIP) established under the National Flood Insurance Program (NFIP) regulations at 44 CFR 61.17.

(1) The premium for the GFIP is a necessary expense within the meaning of this section. FEMA or the State shall withhold this portion of the Other Needs award and provide it to the NFIP on behalf of individuals and households who are eligible for coverage. The coverage shall be equivalent to the maximum assistance amount established under section 408 of the Stafford Act.

(2) FEMA or the State IHP staff shall provide the NFIP with records of individuals who received an "Other Needs" award and are to be insured through the GFIP. Records of "Other Needs" applicants to be insured shall be accompanied by payments to cover the premium amounts for each applicant for the 3-year policy term. The NFIP will then issue a Certificate of Flood Insurance to each applicant. Flood insurance coverage becomes effective on the 30th day following the receipt of records of GFIP insureds and their premium payments from the State or FEMA, and such coverage terminates 36 months from the inception date of the GFIP, which is 60 days from the date of the disaster declaration.

(3) Insured applicants would not be covered if they are determined to be ineligible for coverage based on a number of exclusions established by the NFIP. Therefore, once applicants/policyholders receive the Certificate of Flood Insurance that contains a list of the policy exclusions, they should review that list to see if they are ineligible for coverage. Those applicants who fail to do this may find that their property is, in fact, not covered by the insurance policy when the next flooding incident occurs

and they file for losses. Once the applicants find that their damaged buildings, contents, or both, are ineligible for coverage, they should notify the NFIP in writing in order to have their names removed from the GFIP, and to have the flood insurance maintenance requirement expunged from the data-tracking system.

[67 FR 61452, Sept. 30, 2002; 67 FR 62896, Oct. 9, 2002]

§ 206.120 State administration of other needs assistance.

(a) *State administration of other needs assistance.* A State may request a grant from FEMA to provide financial assistance to individuals and households in the State under § 206.119. The State may also expend administrative costs not to exceed 5 percent of the amount of the grant in accordance with section 408(f)(1)(b) of the Stafford Act. Any State that administers the program to provide financial assistance to individuals and households must administer the program consistent with §206.119 and the State Administrative Option and the State Administrative Plan that we describe at paragraph (b) and (c) of this section.

(b) *State administrative options.* The delivery of assistance under §206.119 is contingent upon the State choosing an administrator for the assistance. The State may either request that FEMA administer the assistance or the State may request a grant from FEMA for State administration. The Governor or designee will execute the State Administrative Option annually. During non-disaster periods the State may submit any proposed amendments to the administrative option in writing to the FEMA

Regional Administrator. FEMA shall review the request and respond to the Governor or his/her designee within 45 days of receipt of the proposed amendment;

(c) *State Administrative Plan (SAP).* The delivery of assistance by a State under this section is contingent upon approval of a SAP, which describes the procedures the State will use to deliver assistance under section 408 of the Stafford Act, 42 U.S.C. 5174, when a State requests a grant to administer Other Needs assistance. All implementation procedures must be in compliance with Federal laws and requirements, State laws and procedures, and paragraphs (c) and (d) of this section.

(1) *Timeframe for submission of SAP.* A signed SAP, or renewal, must be provided to the FEMA Regional Administrator prior to November 30 of each year. A SAP shall be effective for at least one year, and must be resubmitted in full every three years.

(2) *Renewals.* Annual updates/revisions to the SAP must be submitted by November 30 of each year for FEMA's review and approval by December 31. If the SAP does not need to be updated/revised, a letter from the State stating the SAP is still current must be submitted by November 30 to document the SAP submission requirement.

(3) *Amendments.* The State may request amendments to the SAP at any time. An amendment is effective upon signature by the FEMA Regional Administrator and the Governor or his/her designee. The State may request an amendment to the administrative plan as follows:

(i) During non-disaster periods. The State may submit any proposed amendments to the SAP in writing to

the FEMA Regional Administrator. FEMA shall review the request and respond to the Governor or his/her designee within 45 days of receipt of the proposed amendment;

(ii) During Presidentially-declared disasters. The State shall submit any proposed amendments to the SAP in writing to FEMA within three days after disaster declaration. FEMA shall review the request and respond to the Governor or his/her designee within three days of receipt.

(d) *State administrative plan requirements.* The State shall develop a plan for the administration of the Other Needs assistance that describes, at a minimum, the following items:

(1) Assignment of grant program responsibilities to State officials or agencies.

(2) Staffing Schedule that identifies the position, salary and percent of time for each staff person assigned to program administration and/or implementation.

(3) Procedures for interaction with applicants:

(i) Procedures for notifying potential applicants of the availability of the program, to include the publication of application deadlines, pertinent program descriptions, and further program information on the requirements which must be met by the applicant in order to receive assistance;

(ii) Procedures for registration and acceptance of applications, including late applications, up to the prescribed time limitations as described in §206.112;

(iii) Procedures for damage inspection and/or other

verifications.

(iv) Eligibility determinations.

(A) Under a cooperative agreement: The procedure for eligibility determinations when the FEMA application and inspection systems are used by the State but additional eligibility criteria are necessary to make State eligibility determinations.

(B) Under a grant: The procedure for eligibility determinations when the FEMA application and inspection systems are not used by the State, including the method for determination of costs for personal property and provision of a standard list for personal property items with allowable costs identified for each item.

(v) Procedures for checking compliance for mandated flood insurance in accordance with §206.110(k);

(vi) Procedures for notifying applicants of the State's eligibility decision;

(vii) Procedures for disbursement of funds to applicants;

(viii) Procedures for applicant appeal processing. Procedures must provide for any appealable determination as identified in §206.115(a);

(ix) Procedures for expeditious reporting of allegations of fraud, waste or abuse to DHS Office of Inspector General.

(x) Capacity to investigate allegations of waste, fraud and abuse independently if requested by DHS OIG, or in conjunction with DHS OIG.

(xi) Provisions for safeguarding the privacy of applicants

and the confidentiality of information, in accordance with §206.110(j).

(xii) Provisions for complying with §206.116(b), Recovery of funds.

(4) Procedures for financial management, accountability and oversight.

(i) Procedures for verifying by random sample that assistance funds are meeting applicants' needs, are not duplicating assistance from other means, and are meeting flood insurance requirements.

(ii) Provisions for specifically identifying, in the accounts of the State, all Federal and State funds committed to each grant program; and for immediately returning, upon discovery, all Federal funds that are excess to program needs.

(iii) Provisions for accounting for cash in compliance with State law and procedure and the Cash Management Improvement Act of 1990, as amended.

(iv) Reports.

(A) Procedures for preparing and submitting quarterly and final Financial Status Reports in compliance with 44 CFR 13.41.

(B) Procedures for submitting Program Status Reports in compliance with paragraph (f)(2)(iii) of this section.

(C) Procedures for preparing and submitting the PSC 272, Federal Cash Transactions Report.

(v) Procedures for inventory control, including a system for identifying and tracking placement of equipment

purchased with grant funds or loaned by FEMA to the State for purposes of administering the Individuals and Households Program.

(vi) Procedures for return of funds to FEMA.

(vii) State criteria and requirements for closing out Federal grants.

(viii) Process for retention of records.

(e) *Application for assistance procedure.* This section describes the procedures that must be followed by the State to submit an application to administer the Individuals and Households Program through a Grant Award or a Cooperative Agreement.

(1) The State must submit an Other Needs assistance application to the Regional Administrator within 72 hours of the major disaster declaration before IHP assistance may be provided. FEMA will work with the State to approve the application or to modify it so it can be approved.

(2) The application shall include:

(i) Standard Form (SF) 424, Application for Federal Assistance;

(ii) FEMA Form (FF) 20–20 Budget Information—Non Construction Programs;

(iii) Copy of approved indirect cost rate from a Federal cognizant agency if indirect costs will be charged to the grant. Indirect costs will be included in the administrative costs of the grant allowed under paragraph (a) of this section; and

(iv) Disaster specific changes to the State Administra-

tive Plan, if applicable.

(f) *Grants management oversight—*

(1) *Period of assistance.* All costs must be incurred within the period of assistance, which is 18 months from the date of the disaster declaration. This period of assistance may be extended if requested in writing by the State and approved in writing by the Assistant Administrator for the Disaster Assistance Directorate. The State must include a justification for an extension of the assistance period.

(2) *Reporting requirements.*

(i) The State shall provide financial status reports, as required by 44 CFR 13.41.

(ii) The State shall provide copies of PSC 272, Federal Cash Transactions Report to FEMA. The PSC 272 is required quarterly by the Department of Health and Human Services from users of its SMARTLINK service.

(iii) The State shall provide weekly program status reports which include the number and dollar amount of applications approved, the amount of assistance disbursed and the number of appeals received.

(3) *Ineligible costs.* Funds provided to the State for the administrative costs of administering Other Needs assistance shall not be used to pay regular time for State employees, but may be used to pay overtime for those employees.

(4) *Closeout.* The State has primary responsibility to closeout the tasks approved under the Grant Award. In compliance with the period of assistance, as identified

in the award, the State must reconcile costs and payments, resolve negative audit findings, and submit final reports within 90 days of the end of the period of assistance. The State must also provide an inventory of equipment purchased with grant funds and loaned to it by FEMA for purposes of administering IHP, which lists the items, dates, and costs of equipment purchased.

(5) *Recovery of funds.* The State is responsible for recovering assistance awards from applicants obtained fraudulently, expended for unauthorized items or services, expended for items for which assistance is received from other means, and awards made in error.

(i) Adjustments to expenditures will be made as funding is recovered and will be reported quarterly on the Financial Status Report.

(ii) A list of applicants from whom recoveries are processed will be submitted on the quarterly progress report to allow FEMA to adjust its program and financial information systems.

(iii) The State will reimburse FEMA for the Federal share of awards not recovered through quarterly financial adjustments within the 90 day close out liquidation period of the grant award.

(iv) If the State does not reimburse FEMA within the 90 day close out liquidation period, a bill for collection will be issued. FEMA will charge interest, penalties, and administrative fees on delinquent bills for collection in accordance with the Debt Collection Improvement Act. Recovered funds, interest, penalties, and fees owed to FEMA through delinquent bills for collection may be offset from other FEMA disaster assistance

programs from which the State is receiving funds or future grant awards from FEMA or other Federal agencies. Debt collection procedures will be followed as outlined in 44 CFR part 11.

(6) *Audit requirements.* Pursuant to 44 CFR 13.26, uniform audit requirements apply to all grants provided under this subpart.

(7) *Document retention.* Pursuant to 44 CFR 13.42, States are required to retain records, including source documentation, to support expenditures/costs incurred against the grant award, for 3 years from the date of submission to FEMA of the final Financial Status Report. The State is responsible for resolving questioned costs that may result from an audit conducted during the three-year record retention period and for returning disallowed costs from ineligible activities.

[67 FR 61452, Sept. 30, 2002; 67 FR 62896, 62897, Oct. 9, 2002]

APPENDIX F

[Declaration, Record USCA5 466-67]

DECLARATION OF MARY ALICE NICHOLS

My name is Mary Alice Nichols. I am over age 18 and capable of testifying in court. I have personal knowledge of the following facts:

1. I am an investigative reporter who works in the Rio Grande Valley. I live in McAllen, Texas. I have lived in the Rio Grande Valley for 24 years.

2. During the summer and fall of 2008 I spent about 3-4 months preparing a news article about FEMA denials amongst Valley residents during Hurricane Dolly.

3. As part of my research for this article, I contacted officials of the Federal Emergency Management Agency (FEMA).

4. During September and October 2008 I met FEMA officials at FEMA offices in McAllen. While I was there, FEMA officials allowed me to review FEMA documents. I was allowed to view the Housing Assistance report, by FEMA spokesperson Charles Powell. The report listed the number of victims with insufficient damage (deferred maintenance), other needs assistance, total applications, ineligible insurance, total inspections since Sept. 2008, and number of inspectors in the field. I was allowed to only view, take notes and ask questions.

5. There were 14,900 insufficient damage denials listed in the Housing Assistance Report and FEMA spokesperson Charles Powell explained that those were considered "deferred maintenance."

6. From the documents that FEMA officials showed to me, I learned that: (a) FEMA had received over 36,000 applications for assistance following Hurricane Dolly; (b) FEMA had denied over 22,000 of those applications; and (c) FEMA's reason for denying home repair assistance that was sought in about 15,000 of these applications was FEMA's determination that the damage was caused at least in part by what FEMA called "deferred maintenance."

7. The documents described above made me inquire more into what FEMA meant by "deferred maintenance." This is why I interviewed FEMA spokesperson Charles Powell about this subject. Mr. Powell stated to me that most FEMA denials following Hurricane Dolly were for deferred maintenance. Mr. Powell stated that it depends on the area, and the type of community, which is why there was such a high rate of denials in the Valley. By way of explaining the Valley's high deferred maintenance denial rate, Mr. Powell stated: "A lot of the homes built were built from second hand materials.... So the damage was, in most cases, caused from the faulty building of the house and not the storm."

8. Mr. Powell did not dispute that Hurricane Dolly was one cause of the damage to the Valley homes. In his opinion, though, deferred maintenance was one main cause of the damage because of where many

homes were located and how they were built.

9. From my conversations with FEMA officials and study of FEMA's documents, my best understanding is that when FEMA inspectors decide, in their subjective judgment, that home repairs should be denied due to the substandard condition of a home, they mark the damage as caused by "deferred maintenance."

10. Attached to this declaration is a true and complete copy of the news article that I published following the investigation I describe above.

Under 28 U.S.C. § 1746, I declare under penalty of perjury that the above statements are true and within my personal knowledge.

Signed this 18th day of July, 2009.

/s/

MARY ALICE NICHOLS

APPENDIX G

[Letter Denying Eligibility, Record USCA5 118]

[FEMA Seal]

R. David Paulison
Administrator
Federal Emergency Management Agency

National Processing Service Center 08/12/2008
P.O. Box 1005
Hyattsville, MD 20782-7055

FEMA Application No. 410079518 Disaster No. 1780

Dear MS ELIZABETH ALVARADO:

We recognize how difficult a time this is for you and your family and we understand that many people need help following a disaster. We are committed to providing you any help we can, including important information to begin your recovery.

The Federal Emergency Management Agency (FEMA) and State of Texas have carefully considered all available information regarding your request for assistance. Our decision(s) about your request is listed below:

CATEGORIES	DETERMINATION
Housing Assistance	IID- Ineligible - Insufficient Damage
Total Grant Amount:	$0.00

IID - Ineligible - Insufficient Damage

Based on your FEMA inspection we have determined that the disaster has not caused your home to be unsafe to live in. This determination was based solely on the damage to your home that are related to this disaster.

Although the disaster may have caused some minor damage, it is reasonable to expect you or your landlord to make these repairs. At this time you are not eligible for FEMA housing assistance.

If you do not agree with our decision, you have the right to appeal. Please send us documents such as a statement from local officials, contractor estimates, etc. to show that the damage to your home was caused by the disaster and has caused unsafe or unlivable conditions.

If you need to file an appeal

You should carefully read this letter that explains our decision(s) about your FEMA disaster assistance. An appeal is a written request from you to FEMA, sent along with new information and documents, asking FEMA to review your case again. To file an appeal you must do the following: ....

/s/

[FEMA Representative]

APPENDIX H

[Declaration, Record USCA5 409-410]

STATE OF TEXAS §
§ LUPE, *et al. v.* FEMA
§ No. 08-cv-487
COUNTY OF CAMERON §

DECLARATION OF ELIZABETH ALVARADO

My name is Elizabeth Alvarado. I am a plaintiff in the above lawsuit against FEMA. I am over age 18 and capable of testifying in court. I have personal knowledge of the following facts:

1. I live in Lozano, which is a small town near San Benito, Texas with both of my parents and my two children who are 15 and 3 years old. We all live in a small house which totals approximately 1000 square feet. We have lived in our home for about 35 years. Our only income is mine from working for the school district and my dad's worker's compensation benefits. He has been unable to work full-time since November 2008 due to knee problems and pain, and just recently had surgery on his knee.

2. Hurricane Dolly caused major damage to our home. The wind and rain came in and tore up our house. The wind tore off shingles and damaged our roof. In fact, the roof over my parents' bedroom was so damaged that an entire sheet of shingles and roofing blew off, leaving behind a hole in the ceiling. We could even see the bars in between. There was no roof

on top at all. Just the sheetrock was left. Water starting pouring in like a faucet through the hole in that room. We collected the water and had to dump it out every 15 minutes since it was a steady stream. We also had roof damage and leakage in other areas of the house. There was also cracking in our house on the ceiling and walls from the wind.

3. Right after the storm died down my dad had to go on the roof and put down a piece of plywood to cover up the open areas, missing shingles, and holes so the major leaks would stop. We also started getting mold in the house right away from the water. As soon as we got the lights and electricity back on we started scrubbing the mold with soap and Clorox. We let it dry and then had to do it allover again. We had to purchase the nails, plywood and cleaners and spent around $200-$300. We didn't have much money to spare, but we needed to do something to make it safer.

4. The winds were so bad a piece of wood came off of an outhouse on another lot and flew into my dad's truck on the driver's side. It made a hole in the truck and cracked the side mirror. The truck still is not fixed.

5. Since the stonn the house still leaks when it rains. And also when it rains we start to see the mold again. Rain is still coming in even though its boarded and we can't find the exact leak. It needs to be repaired properly. And I have to keep cleaning the mold again. You can still smell the scent of mold or mildew when it rains. We have only been able to do minimal re-

pairs ourselves since my father had surgery and knee problems so he cannot get on the roof. We cannot afford to hire someone to make the repairs. The estimate we got from a contractor was for over $3,000. We don't have this sort of money.

6. FEMA denied us assistance to repair our home, saying that we didn't have damage or that it was there before the storm. This makes no sense. We were all here when Dolly hit and saw the roof flapping up and down and shingles coming off. We could feel the house shake and we saw the water come in. There was never mold or leaks before the storm.

7. I worry that if we do not get help with these damages and repairs before another storm comes we could face serious problems. The roof could fly off or cave in, putting my parents or kids in danger. Also with the leaks and mold coming back all the time I worry about our health and safety. We don't know how high the mold is and we keep smelling it each time it rains. In the winter we only have space heaters to heat the home and a leak could cause a fire.

8. The whole family wonders why we aren't getting help from FEMA. How could they help others that don't really need it and not us? We have been honest and did everything they asked. We didn't have insurance and we only have a limited set income. Why can't they help us with at least a part of what has been quoted to us to fix our damaged roof? We need help to make this home safe again.

9. FEMA has done nothing to help us. They sent an inspector who hardly looked around and said he was

really only allowed to take two photos, but he would go ahead and take three of them, just for us. I don't understand that at all. Why wouldn't they take photos of everything that needed to be seen as far as damage and repairs? And then they just sent a small check that couldn't even get us started. It wasn't even enough for the shingles or plywood. And they denied us any other help.

10. Before I applied for home repair assistance, I did not know that FEMA denied applications if FEMA somehow concluded that maintenance of the home was inadequate prior to the disaster. The availability of home repair assistance from FEMA played no role in the decisions that my family made about how to maintain our home prior to Hurricane Dolly.

11. Attached to this declaration are photographs that I took showing damage that Dolly caused to our house.

Under 28 U.S.C. § 1746, I declare under penalty of perjury that the above statements are true and within my personal knowledge.

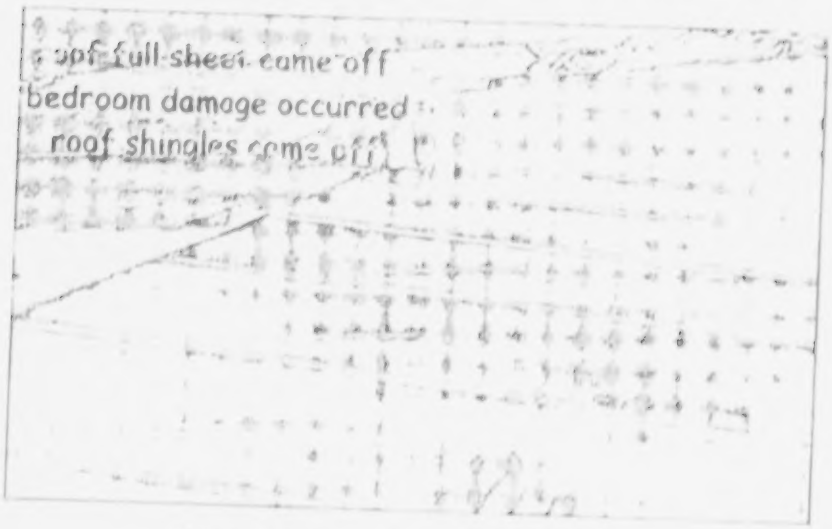
Signed this 20th day of July, 2009.

/s/

ELIZABETH ALVARADO

APPENDIX I

[Photographs, Record USCA5 411, 464]



Petitioner Alvarado's Roof

Bedroom of Petitioners Norma and Ernesto Lopez